Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

GARY ANDERSON, LOUIS SCOHY AND GEORGE SQUIER,

Petitioners,

v.

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA; INTERNATIONAL EXECUTIVE BOARD OF THE UPGWA; AND RETIREMENT PLAN OF THE UPGWA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Sixth Circuit err in dismissing petitioners' ERISA claims and violate U.S. Const. Art. I, § 1, and the separation of powers by exercising legislative power to rewrite §501(a) of the Labor Management Reporting and Disclosure Act (LMRDA) (authorizing union members to bring suit against union officials for breach of their fiduciary duties) to create an affirmative defense for the respondent union to defeat enforcement of an early retirement contract it initiated and induced petitioners to accept and execute; an action that so far departed from the accepted and usual course of judicial proceedings, as to call for exercise of this Court's supervisory power; and a ruling which directly conflicts with a host of Supreme Court cases repeating the fundamental rule that courts are to interpret acts of Congress but have no license to rewrite federal statutes or make new law, including *U.S. v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494-495, fn 7 (2001); *Chapman v. U.S.*, 500 U.S. 453, 464 (1991); and *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 96, fn 34 (1981); and such ruling conflicts with *M.C.I. Telecommunications Corp. v American Tel. & Tel.*, 512 U.S. 218, 231, fn 4 (1994) (courts are bound not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes).

2. Did the Sixth Circuit err in dismissing petitioners' ERISA claims and in finding petitioners guilty of violating §501(a) by voting on the resolution amending the officers' pension plan to offer a new enhanced early retirement benefit in exchange for the elimination of petitioners' positions, because petitioners were not acting in a

fiduciary capacity; and such ruling ignored and conflicts with *Lockheed Corporation v. Spink*, 517 U.S. 882, 889-890 (1996) (employers or other plan sponsors are not acting in a fiduciary capacity when amending a pension plan, and *Hughes Aircraft v. Jacobson*, 525 U.S. 432, 444-445 (1999) (adding a new benefit structure to an existing plan does not involve fiduciary capacity).

3. Did the Sixth Circuit err in dismissing petitioners' ERISA claims and ruling that respondent union could lawfully eliminate petitioners' officer positions without paying them their early retirement benefits because the Sixth Circuit in the first appeal had ruled the parties had made a contract on December 8, 1994; and the cited ruling in the second appeal violated the law of the case and condoned a breach and repudiation of a contract; and such ruling, in effect, reinstated the first district court opinion which the Sixth Circuit had reversed in the first appeal; and such ruling conflicts with *Agostini v. Felton*, 521 U.S. 203, 236 (1997) (under the law of the case doctrine, a court ought not to reopen issues decided at an earlier point in the same litigation); *Christianson v. Colt Industries Operation Corp.*, 486 U.S. 800, 816 (1987) (the law of the case doctrine promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues); and *Arizona v. California*, 460 U.S. 605, 618 (1982) (when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case).

4. Did the Sixth Circuit err in dismissing petitioners' ERISA claims and ruling the early retirement contract violated the union constitution because the union's attorneys had proposed a simple amendment to the constitution which would have removed any impediment to performance; and

such ruling conflicts with *U.S. v. Winstar Corp.*, 518 U.S. 839, 909-910; 918 (concurring opinion Breyer J.), 920 (concurring opinion Scalia, J.), and the universal rule that a party may not assert the impossibility (or illegality) defense which either the party has created or which lies within the party's power to remove.

5. Did the Sixth Circuit err in dismissing petitioners' ERISA claims because, by accepting and retaining the cost-savings benefits of the transaction, the respondents have ratified the transaction and, therefore, cannot challenge the validity of the transaction; and such ruling conflicts with *Federal Power Commission v. Colorado Interstate Gas Company*, 348 U.S. 492, 505 (1955); *Baker v. Cummings*, 181 U.S. 117, 130 (1901), and universal law recognizing that rule.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioners Gary Anderson, Louis Scohy and George Squier are individuals. No publicly owned corporation has any financial interest in the outcome of this proceeding.

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The September 10, 2004 order of the United States Court of Appeals for the Sixth Circuit denying rehearing *en banc* and rehearing is reprinted at App. 1a-2a. The June 7, 2004 2-1 panel decision of the Sixth Circuit is reported at 370 F.3d 542 (CA 6, 2004) and is reprinted at App. 3a-30a. The Sixth Circuit majority opinion reversed the January 4, 2000 decision of the United States District Court for the Eastern District of Michigan, which had granted judgment for petitioners, and is reprinted at App. 31a-75a. The January 4, 2000 decision of the District Court was a response to the remand by the Sixth Circuit in the first appeal of this case reported at 150 F.3d 590 (CA 6, 1998), and is reprinted here at App. 76a-83a. That first appeal of this case was a unanimous reversal and remand of the decision of the District Court dated January 17, 1997, and is reprinted here at App. 84a-118a.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The 2-1 panel opinion of the United States Court of Appeals for the Sixth Circuit was entered on June 7, 2004. *See*, Appendix B, App. 3a-30a. A timely petition for *en banc* rehearing was denied on September 10, 2004. *See*, Appendix A, App. 1a-2a. This petition for certiorari is timely in that petitioners have filed it within 90 days of September 10, 2004.

STATUTORY PROVISIONS INVOLVED

This case involves application of § 501(a) of the Labor Management Reporting and Disclosure Act (LMRDA), found at 29 U.S.C. § 501(a). The principal objective of this litigation was to obtain early retirement benefits under Section 502 of ERISA, specifically, 29 U.S.C. § 1132(a)(1)(B) and 29 U.S.C. § 1132(a)(3)(B)(ii). 29 U.S.C. § 501(a) provides:

(a) Duties of officers; exculpatory provisions and resolutions void the officers agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

29 U.S.C. § 1132(a)(1)(B) provides:

A civil action may be brought –

* * *

(1) by a participant or beneficiary –

* * *

(B) to recover benefits due to him under the terms of his plan, or to clarify his rights to

future benefits under the terms of the plan;

. . .

29 U.S.C. § 1132(a)(3)(B)(ii) provides:

A civil action may be brought –

* * *

(3) by a participant, beneficiary, or fiduciary . . . (B) to obtain other appropriate equitable relief . . .(ii) to enforce any provisions of this subchapter or terms of the plan.

STATEMENT OF THE CASE

I. Nature of the Case

In an ERISA action petitioners sought to recover early retirement benefits, as promised in written contracts initiated, drafted, and induced by respondents, in exchange for cost savings produced by elimination of petitioners' union officer positions. App. 119a-121a.

Petitioners' complaint contained five counts: a claim for benefits under the union's Officer Retirement Plan under 29 U.S.C. § 1132(a)(1)(B) (Count I); promissory estoppel claim under 29 U.S.C. § 1132(a)(3)(B) (Count II); an equitable estoppel claim under U.S.C. § 1132(a)(3)(B) (Count III); an action for a violation of the anit-cutback provisions of 29 U.S.C. § 1054(g)(2) (Count IV); and an interference claim under 29 U.S.C. § 1140 against the union and the IEB only (Count V). App. 99a-100a.

The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331.

II. Statement of Facts

Petitioners Anderson and Squier are former regional directors of the respondent United Plant Guard Workers of

America (UPGWA) (the "union"). App. 86a. Petitioner Scohy is the former vice-president of the union. *Id.* All officers and regional directors are full-time officers of the union and members of the International Executive Board (the "IEB"). App. 85a-86a.

The union experienced severe financial difficulties in 1993-1994. App. 86a. In November 1994, president Eugene McConville proposed a plan to save the union. A major part of the plan was to eliminate regional directorships and the position of vice-president in return for providing a new early retirement package for those officers who agreed to leave. *Id.* The union accountant provided schedules which showed the elimination of the vice-president position would save $525,000 over five years; and the elimination of three regional directorships would save $1.7 million over five years. App. 87a. David Kaufman, former accountant for the union, testified that these figures were net cost savings after factoring in the cost of the early retirement contracts. App. 125a.[1] Mr. Kaufman confirmed that when he relinquished his engagement with the union at the end of 1997, the cost savings were on track with the 1994 projections. App. 124a. The respondents presented no evidence that the cost savings from the elimination of petitioners' positions were not achieved, or that those cost savings would not extend to the future.

A special meeting of the IEB was called for December 6-9, 1994 to consider president McConville's proposals for cost

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[1] The elimination of two regional directorships of petitioners Anderson and Squier means two-thirds of the $1.7 million cost savings were realized. Thus, the vice-president savings of $525,000, plus two-thirds of the $1.7 million, or $1.6 million over five years, were the actual cost savings realized by the elimination of petitioners' positions. Such savings were net of the costs of the enhanced early retirement packages.

savings. App. 38a. On December 7, 1994, the IEB passed a resolution offering full-time union officers an early retirement window if they met the eligibility requirements of 50 years of age or older, their retirement would eliminate a full-time position, the retirement must be taken on February 15, 1995, and acceptance of the offer must be made by the next day, December 8, 1994. App. 49a-50a. The resolution concluded with the following plan amendment (App. 51a):

> IT IS FURTHER RESOLVED that the Officers Retirement Plan be amended to incorporate this early retirement window, and the International President and International Secretary-Treasurer are directed to take such action as is necessary and appropriate to implement this Resolution.

The resolution was adopted by a vote of eight in favor and three opposed with petitioners joining the majority two-thirds vote. App. 49a. Petitioner Scohy, who was then Chairman of the Pension Committee, and IEB member Ronald Warfield both testified nothing more than the IEB's resolution was required to amend the pension plan; and to implement the amendment, the resolution would be sent to the actuary company with instructions to calculate petitioners' pension benefits. App. 68a.

On December 8, 1994, petitioners executed written acceptances of the offer set forth in the December 7th IEB resolution. App. 119a-121a. These one page contracts, drafted by the UPGWA's own attorneys, made it clear that the UPGWA had extended the offers. *Id.*

On December 9, 1994, the IEB passed another resolution consolidating, rearranging and dissolving certain regions, which eliminated the former stand-alone regions of petitioners Anderson and Squier and eliminated their offices. App. 52a-53a. The vice-president office of petitioner Scohy was a

constitutional position, which required a constitutional amendment, which was accomplished at the 1995 International Convention, thus eliminating petitioner Scohy's position. App. 11a.

In the January 4, 2001 detailed opinion granting judgment to petitioners, the district court cited the testimony showing president McConville and union attorney Gordon Gregory had assured petitioners prior to their acceptance that the proposed early retirement contracts were valid and enforceable, and the proposal had been checked by both union accountants and the union attorneys. App. 67a. The district court concluded that there was ample evidence showing president McConville and the IEB were authorized to enter into the early retirement contracts. *Id.* The district court also cited the petitioners' testimony that they relied upon the representations of no legal problems by president McConville and attorney Gregory; cited the testimony of president McConville and attorney Gregory that it was reasonable for IEB members to rely upon Mr. Gregory's legal opinions and assurances; and concluded the petitioners had reasonably relied upon the apparent authority of the IEB to adopt the December 7, 1994 resolution offering early retirement. App. 68a-69a. The district court also found, by application of agency principles of apparent authority, that the union was bound by the terms of the December 7, 1994 resolution amending the Officers Retirement Plan to grant early retirement benefits to petitioners.[2] App. 70a.

The district court also noted testimony by the three petitioners that before the vote on December 7, 1994, in a

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[2] The District Court's detailed reasoning and findings as to apparent authority and reasonable reliance were pursuant to explicit remand instructions of the 3-0 first panel of the Sixth Circuit to consider this case. App. 81a-82a.

"sidebar" meeting with union attorney Gordon Gregory, they asked him whether they could lawfully vote on the proposal, and that Gregory assured them they could lawfully do so. App. 48a. The district court also cited Gregory's testimony that he was unable to confirm whether any of the petitioners asked whether they could vote. App. 48a, fn 8. However, Gregory also testified that if petitioners had asked that question, he would have told them they could vote. *Id.*

On December 22, 1994, IEB member Jack Webb, and a regional director, wrote a letter to president McConville informing the union of his intent to bring suit against the union and its officers on the grounds the early retirement contracts violated the union constitution and §501(a) of the LMRDA. App. 53a-55a. Union attorney Gordon Gregory sent president McConville an opinion letter and memorandum dated January 4, 1995, recommending either the abandonment of the early retirement plan or submitting it to the Convention for approval. App. 58a. The memorandum, which accompanied the letter of Mr. Gregory, is notable because the union attorneys also proposed an amendment to the union constitution, which would have removed any constitutional or §501 impediment to performance. The proposed amendment to article XI, §2(b), of the union constitution, said this (App. 122a):

> The normal retirement age shall be sixty (60) years. Disability and early retirement benefits shall be in accordance with the normal retirement age. FROM TIME TO TIME, WINDOW EARLY RETIREMENTS MAY BE OFFERED, INCLUDING IMPUTED AGE AND/OR SERVICE CREDITS, WHEN SUCH OFFERS RESULT IN REDUCTIONS OF STAFF WHICH ARE NECESSARY TO PROTECT THE UNION'S FINANCIAL POSITION. [Added text is in capital letters.]

This proposed amendment to the union constitution could have been accomplished in January, 1995, because the union constitution provided in Art. III, entitled "Constitution and By-Laws" (App.131a):

> The International Executive Board shall be empowered by a two-thirds vote to make such interim changes in this Constitution and By-Laws applicable only until the next regular Constitutional Convention, as may from time to time be necessary to conform this Constitution and By-Laws with any applicable laws.

Nevertheless, (*i.e.* despite being shown a way to remove any impediment to the contracts), president McConville circulated to the IEB a referendum requesting a vote on the question of whether the IEB should defer implementation of the December 7, 1994 resolution, maintain the status quo, and submit the matter to the 1995 Convention. App. 59a. The IEB voted in favor of that referendum. *Id.*

Rather than maintaining the status quo, however, president McConville soon circulated another referendum on January 24, 1995, asking the IEB to go forward with the realignment of regions, which was voted favorably. App. 128a-129a. Mr. McConville testified that this realignment was done to save money (*i.e.* achieve the same cost savings but without honoring the union contracts with petitioners). App. 129a.

Thereafter, at the May 1995 Convention, the membership voted to amend the union constitution to eliminate petitioner Scohy's vice-president position. App. 60a. However, the membership rejected implementation of the early retirement contracts. *Id.* Hence, the union realized <u>all</u> the projected savings, without honoring its contracts with petitioners. App. 119a-121a. Petitioners thereafter commenced this litigation.

III. Proceedings Below

In the original district court proceedings, the district court granted respondents' motion for summary judgment, ruling that the purported early retirement contracts violated the union constitution and, therefore, were unenforceable as illegal contracts. App. 110a. On petitioners' estoppel claims, the district court held that, even if estoppel principles were to apply to a claim for pension benefits, petitioners could not show detrimental reliance, and those claims failed. App. 112-113a. Finally, the district court ruled that petitioners had not shown a proper basis for the "anti-cutback" claim, or the interference claim. App. 114a-118a.

In the first appeal, a unanimous Sixth Circuit panel ruled the relevant issue was "whether agency principles of apparent authority bind the union to the terms of the resolution passed December 7, 1994, modifying the plan to grant early retirement benefits to plaintiff." App. 80a. The panel said the district court should determine whether president McConville and the IEB were acting within their apparent or actual authority, and whether plaintiffs reasonably relied upon that authority to enter into the agreement for early retirement benefits. App. 81a. In very clear and key language the panel also ruled: "The record amply demonstrates that the Executive Board and plaintiffs reached an agreement on December 8, 1994." App. 83a. The panel concluded with this mandate to the district court (*Id.*):

> For the reasons stated above, we reverse the judgment of the district court and remand for further factual findings on whether principles of apparent authority can bind the union to the December 7, 1994, resolution.

Following the mandate from the Sixth Circuit, the district court, upon remand and a five day bench trial, with extensive

testimony, including numerous IEB members and 35-year union attorney Gordon Gregory, found that president McConville and the IEB had apparent authority to enter into the early retirement contracts, and that petitioners had reasonably relied upon that authority in entering into the early retirement contracts on December 8, 1004. App. 66a-70a.

On the union's appeal to the Sixth Circuit, that became the second appeal of this case, petitioners moved to have the original panel hear the second appeal. This request was denied. Only Judge Merritt, who had authored the first appeal opinion, sat on the panel and authored the dissent in this second appeal. App. 28a-30a.

On apparent authority, the panel majority first commended the district court "for its thorough and thoughtful opinion," but then found clear error in the finding of the district court that petitioners reasonably relied on the apparent authority of president McConville and the IEB. App. 17a. The panel majority held that petitioners had actual knowledge of constitutional limitations (prospective retirees must be 60 years old). App. 18a. The panel majority then concluded this actual knowledge of the constitutional limitation meant petitioners' reliance was unreasonable. App. 18a-19a.

As an alternative basis for reversal, the panel majority ruled that petitioners could not enforce the early retirement contracts because petitioners violated §501(a) of the LMRDA. App. 22a. Although acknowledging that the actual language of §501 authorizes union members to bring suit against union officials for breach of their fiduciary duties, and no such suit was brought against petitioners, the panel majority held, in an issue of first impression, that the respondent union could use §501(a) as an affirmative defense to defeat the union-drafted and induced early retirement contracts. App. 23a.

The panel majority also rejected the argument by petitioners that the union attorneys had suggested a constitutional amendment, which would have cured any impediment to performance (App. 25a), and rejected petitioners' estoppel and ratification claims (App. 25a-27a).

In the dissent, Judge Merritt found that the district court was correct in ruling that the actions of president McConville and union attorney Gregory manifested authority in the IEB to offer the early retirement contracts; and was correct in ruling petitioners reasonably relied on such manifestations. App. 28a. The dissent took issue with the respondent union persuading union officers to sign a contract and then use §501 as a defense to the contract the union had executed and induced. App. 29a. The dissent concluded by stating the following (App. 30a):

> We should not now allow the Union to avoid the contract it drafted and asked them to sign, especially by means of a statutory provision that only provides a cause of action for third-party Union members. Doing so turns Section 501 into a one-sided escape route for Unions that Congress never intended.

REASON FOR GRANTING THE PETITION

Supreme Court Rule 10 specifies the considerations used by this Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. One consideration is that a "United States Court of Appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Another consideration is the Court considers whether the court of appeals' decision "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power . . ."

Both considerations are present in this case. This case involves the proper role of courts under U.S. Const. art I, §1, and the separation of powers, the proper construction of §501 of the LMRDA, an important provision regarding government of labor unions, and the enforcement of pension rights, a core purpose of ERISA.[3] The majority panel decision, in ruling that §501(a) of the LMRDA could be used by the respondent union as an affirmative defense to defeat enforcement of early retirement contracts it initiated and induced petitioners to accept and execute, violated this Court's command in a host of cases that courts cannot rewrite federal statutes or make new law; and violated the command of *M.C.I. Telecommunications Corp. v. American Tel. & Tel.*, 512 U.S. 218, 231, fn. 4 (1994) that courts are bound not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate and prescribed, for the pursuit of those purposes. This ruling also has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

In finding petitioners' voting on the December 7, 1994 resolution, which amended the Officers' Retirement to add a new early retirement benefit, violated §501(a), the panel majority also ignored and rejected *Lockheed Corporation v. Spink*, 517 U.S. 882, 889-890 (1996) and *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444-445 (1999), which held

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[3] In 2003, there were 11,304 ERISA cases on the dockets of United States District Courts. Leonidas, Ralph Mecham, 2003, *Annual Report of the Director for the Judicial Business of United States Court*, Table C-2A (use Google, search Judicial Business of the United States, click that title, then click 2003 Annual Report of the Director, then click Table C-2A). Only general habeas corpus cases (23,070), employment discrimination (20,507), and civil rights cases (14,690) comprised larger segments of the courts' civil dockets.

that amending a pension plan or adding a new benefit structure to an existing plan does not involve fiduciary capacity; and, therefore, there could be no violation of §501(a) in this case. And by ignoring binding precedents by this Court, the Sixth Circuit panel majority has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

The panel majority's ruling that the respondent union could eliminate petitioners' officer positions without paying them their early retirement benefits also violated this Court's jurisprudence on law of the case, because, in the first appeal of this case, the Sixth Circuit ruled that the parties had made a contract on December 8, 1994 (App. 83a); and such ruling condoned a unilateral breach and repudiation of a contract.

In ruling that petitioners' ERISA claims failed because the early retirement contracts violated the union constitution, the panel majority ignored the fact that the union's attorneys had proposed a simple amendment to the constitution which would have removed any impediment to performance; and such ruling ignored *U.S. v. Winstar Corp.*, 518 U.S. 839 (1996) and the universal rule that a party may not assert the impossibility (or illegality) defense which he has created or lies within his power to remove.

The panel majority also rejected ratification and the rule that, by accepting and retaining the benefits of a transaction, the promisor may not challenge the validity of the transaction; and such ruling conflicts with *Federal Power Commission v Colorado Interstate Gas Company*, 348 U.S. 492, 505 (1955); *Baker v Cummings*, 181 U.S. 117, 130 (1901), and universal law recognizing that principle of ratification.

The Court's review is warranted for all of these reasons.

I. Review is Warranted Because the Sixth Circuit Majority Decision is in Direct Conflict With Several Decisions of This Court; and Because the Sixth Circuit Majority Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call For An Exercise of This Court's Supervisory Power

A. The Panel Majority Ruling That §501(a) of the LMRDA Could Be Used By the Respondent Union as an Affirmative Defense to Defeat Early Retirement Contracts It Initiated and Induced Petitioners to Accept and Execute Directly Conflicts With *Chapman v. U.S.*, 500 U.S. 453, 464 (1991) and a Host of Supreme Court Cases Holding That Courts Are to Interpret Acts of Congress But Have No License to Rewrite Federal Statutes or Make New Law; Directly Conflicts With *M.C.I. Telecommunications v. American Tel. & Tel.*, 512 U.S. 218, 231, fn. 4 (1994) Holding Courts Are Bound By the Means Selected By Congress For Pursuit of Statutory Purposes; And Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call For This Court's Supervisory Power

This Court has repeatedly emphasized that federal courts are to interpret acts of Congress, but have no license to rewrite federal statutes, or make new law. *See, e.g., United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494-495, fn 7 (2001); *Chapman v. United States*, 500 U.S. 453, 464 (1991); *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 95, fn 34 (1981).

A good example of this Court's repeated command is found in *United States v. Albertini*, 472 U.S. 675, 680 (1985), where this Court said this:

> Statutes should be construed to avoid constitutional questions, but this interpretive canon is not a license for the judiciary to rewrite language enacted by the legislature. *Heckler v. Mathews*, 465 U.S. 728, 741-742 (1984). Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, §1, of the Constitution. *United States v. Locke*, 471 U.S. 84, 95-96 (1985). Proper respect for those powers implies that '[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.' *Park 'N Fly v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985).

In *Director, Office of Workers' Compensation Programs, Department of Labor v. Newport Neevs Shipbuilding & Dry Dock Company*, 514 U.S. 122, 136 (1995), this Court said: "Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means – and there is often a considerable legislative battle over what those means ought to be." And, in *M.C.I. Telecommunications v. American Tel. & Tel.*, 512 U.S. 218, 231, fn 4 (1994), this Court gave this instruction: "But we (and the FCC) are bound not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." Citing the above two Supreme Court cases the Eight Circuit, in *Citicasters v. McKaskill*, 89 F.3d 1350, 1355 (CA 8, 1996), stated the rule as follows: "Where Congress has provided a specific means for achieving its

purpose, we must honor its decision, and not embellish its legislative scheme with additional procedural innovations."

Section 501(b) of the LMRDA (29 U.S.C. §501(b)) governs the procedure for bringing a §501(a) action. That section allows suit by a union member only after a request to the labor organization or its governing board to bring suit; and only after the labor organization or the board fails to bring suit within a reasonable time after the request. Most importantly, §501(b) contains a "gatekeeper" provision under which suit can only be brought "upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte." This requirement is a unique safeguard and must be followed in every suit under §501(b) because Congress has selected that safeguard as the appropriate means for pursuit of the objectives of §501(a). See, *M.C.I. Telecommunications Corp. v. American Tel. & Tel.*, 512 U.S. 218, 231, fn 4 (1994). See, also, *Horner v. Ferron*, 362 F.2d 224, 229 (CA 9, 1966) (at the gatekeeper hearing the Court may deny a §501(b) application for a number of reasons, including statute of limitations, res judicata, or collateral estoppel).

The Sixth Circuit panel majority ignored this procedural framework, and the essential gatekeeper function, which Congress has formulated as a prerequisite to suit and any finding of a violation of §501(a). In this case, there was never any §501(b) gatekeeper hearing. The panel majority even commented on the uniqueness of its ruling. App. 23a. The panel majority also brushed aside the procedural requirements of §501(b) as "not applicable" when §501(a) is asserted as an affirmative defense. App. 24a, fn. 12. However, the "gatekeeper" provision of §501(b) makes clear that Congress intended that only suits could be the vehicle for finding violations of §501(a). Judge Merritt's dissent gave

this correct view of what Congress intended, where he said this (App. 30a):

> We should not now allow the Union to avoid the contract it drafted and asked them to sign, especially by means of a statutory provision that only provides a cause of action for third-party Union members. Doing so turns Section 501 into a one-sided escape route for Unions that Congress never intended.

Next, the Sixth Circuit majority decision cited *Kaiser Steel Corp. v. Mullins*, 452 U.S. 72, 77 (1982) for the proposition that federal courts may not enforce illegal contracts. App. 23a. That is a correct statement of the rule, but *Kaiser Steel* does not support the Sixth Circuit majority decision, and, in fact, *Kaiser Steel* points to the grevious error in that decision. *Kaiser Steel* involved a collective bargaining agreement between the United Mine Workers of America and coal producers, including steel companies such as Kaiser Steel. 455 U.S. 74. The agreement contained provisions requiring employers to contribute to specified health and retirement funds, specified amounts for each ton of coal produced, and for each hour worked by covered employees. *Id.* The agreement also contained a "purchase coal" clause requiring employers to contribute to the trust funds specified amounts on each ton of bituminous coal procured or acquired by the employer for use or for sale. 455 U.S. 74-75. Another section of the agreement required employers to make monthly reports on the amounts due the trust funds and tons of coal produced, procured, or acquired for use or for sale. 455 U.S. 75. Kaiser complied with the agreement in making contributions to the trust funds on the tons of coal produced and hours worked by its miners. 455 U.S. 76. However, Kaiser made no reports or contributions under the "purchase coal" provisions. *Id.* After expiration of the labor contract the trustees brought suit under §301 of the Labor

Management Relations Act (LMRA), 29 U.S.C. §185, and §502 of ERISA, 29 U.S.C. §1132. *Id.* Kaiser admitted the failure to report and make contributions, but defended on the ground the agreement on the "purchase coal" provisions were void and unenforceable as violative of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and §8(e) of the NLRA, 29 U.S.C. §158(e). *Id.*

The Supreme Court ruled that the "purchase coal" provisions did indeed violate the antitrust laws and the NLRA. 455 U.S. 78. The argument was made that employer contributions to union welfare funds were not inherently illegal, and that ordering Kaiser to pay would not command conduct that is inherently illegal. 455 U.S. 79. But the Supreme Court pointed out that the obligation to make contributions was tied directly to amount of coal purchased under the illegal "purchase coal" provisions, and therefore was not a "naked promise to pay money to the union funds." 455 U.S. 79. This Court concluded: "It is plain enough that to order Kaiser to pay would command conduct that assertedly renders the promise an illegal undertaking under the federal statutes." *Id.*

In *Kaiser Steel*, the Supreme Court found the "purchase coal" contract provision was intrinsically illegal. 455 U.S. 78. In this case, by contrast, the Sixth Circuit panel majority correctly ruled that the early retirement contracts were not intrinsically illegal. App. 23a. And, a major difference in this case, compared to *Kaiser Steel*, is that the obligation to pay early retirement benefits was not tied to any illegal undertaking. In fact, the early retirement contracts were paid for by cost savings resulting from the elimination of petitioners' positions, and the respondent union had reaped $1.6 million in cost savings from 1995 thru 1999, over and above the cost of the early retirement contracts. Since 1999,

the respondent union has continued to enjoy those same cost savings.

In *Trustees of the Operative Plasterers, et al. v. Journeymen Plasterers Protective and Benefit Society, Local Union No. 5*, 794 F.2d 1217 (CA 7, 1986), cited by the Sixth Circuit majority at App. 23a, the Seventh Circuit questioned, but did not decide, whether §501(a) could be used as a defense where the contract is not intrinsically illegal. 794 F.2d 1220. The Seventh Circuit found no §501(a) violation on other grounds. 794 F.2d 1221.

The Sixth Circuit majority further erred in ruling that §501(a) could be used as an affirmative defense because Congress has specified suits with a "gatekeeper" safeguard as the only means to redress §501(a) violations. The second panel's 2-1 ruling is an impermissible exercise of legislative power and violates the separation of powers. Because the early retirement contracts were not intrinsically illegal, and the obligation to pay retirement benefits was not tied to any illegal undertaking, there was no justification for extending the *Kaiser Steel* decision, a suit under §301 of the LMRA, to §501(a) of the LMRDA and the much different facts of this case.

Finally, it should be emphasized that petitioners (and the union) were acting under the advice from the union's attorney. Not only did the 35-year union attorney Gregory assure petitioners that the contracts were lawful and valid, Gregory also stated to the entire IEB of the union that there were "no problems" with the contracts. App. 41a-42a. Remarkably, this assurance/opinion was given in response to a question of legality raised by IEB member Webb, who later wrote a letter (but never filed suit) challenging the contracts. App. at 41a.

In a similar situation in *Morrissey v. Carran*, 483 F.2d 480, 485 (CA 2, 1974), the Second Circuit found no breach of trust in a suit brought under §501(b) of the LMRDA, and said this:

> The evidence in the record shows that Curran and Wall acted in good faith, relying on the advice of the Union's general counsel. In a matter such as this in which the issue is reasonably open to legal dispute an officer acting in good faith is justified in relying on counsel and is not liable, if he so acts, for breach of trust.

B. Review is Warranted Because the Sixth Circuit Majority Decision is in Direct Conflict With *Lockheed Corporation v. Spink*, 517 U.S. 882, 890 (1996) and *Hughes Aircraft Co. v. Jacobson*, 524 U.S. 432, 444-445 (1996), Which Indicates Petitioners Were Not Acting in a Fiduciary Capacity in Voting on the Resolution Amending the Pension Plan and Could Not Have Violated §501(a); and Because the Sixth Circuit Majority Decision Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call For An Exercise of This Court's Supervisory Power

The central purpose of the December 7, 1999 IEB resolution was to amend the Officers' Retirement Plan to incorporate the new early retirement window. App. 49a-51a. This Court, in *Lockheed Corporation v. Spink*, 517 U.S. 882, 890 (1996), ruled that when employers or plan sponsors modify welfare plans they are not acting as fiduciaries. In *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444-445 (1999), this Court ruled that when employers add a new benefit structure to an existing ERISA plan, they do not fall

into the category of fiduciaries.[4] Thus, IEB members were not acting in a fiduciary capacity in adopting the December 7, 1994 resolution, which means there was no violation of §501(a) in adoption of that resolution.

The Sixth Circuit majority ignored this binding precedent and that disregard for highly relevant Supreme Court precedent is another example of the Sixth Circuit's departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

C. Review is Warranted Because the Sixth Circuit Majority Panel Decision Conflicts With This Court's Jurisprudence on the Law of the Case Doctrine and by Settled Law That a Successive Three-Judge Panel Must Defer to An Earlier Panel

In the first appeal of this case, the Sixth Circuit held, "The record amply demonstrates that the Executive Board and plaintiffs reached an agreement on December 8, 1994." App. 83a. The district court was instructed, on remand, to decide whether president McConville and the IEB were acting within their actual or apparent authority, and whether the petitioners reasonably relied upon that authority in entering into the early retirement contracts. App. 81a-82a. As pointed out, the district court, on remand, obeyed that mandate, and found for petitioners on both apparent authority and reasonable reliance. App. 66a-70a. On the reasonable reliance issue, the evidence was uncontroverted because the three petitioners testified they relied on the assurances of attorney Gregory and president McConville; and because those two main defense witnesses both testified it was reasonable for IEB members to rely on their representations and assurances. App. 68a-69a.

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[4] For the same reasons, there can be no violation of 29 U.S.C. §1106, which precludes "self-dealing" by fiduciaries.

As to alleged personal interest or "conflict or interest" issues, which were raised to the first Sixth Circuit panel, the district court, on remand, noted (App. 69a, fn 16):

> More importantly, all of these issues were matters of record when the case was on appeal before the Sixth Circuit. If, as Defendants argue, the 'conflict of interest' issue rendered Plaintiffs' December 8, 1994 agreements unenforceable, the Sixth Circuit would not have remanded the case for findings on the issue of the apparent authority of McConville and the IEB to bind the Union to the December 8, 1994 agreements.

It is clear in the second appeal that the majority opinion departed from the boundaries of the mandate of the first appeal. Furthermore, not only did the majority opinion improperly exercise legislative power to rewrite §501(a) to provide an affirmative defense to the respondent union, the majority opinion also improperly rejected the uncontroverted evidence of reasonable reliance, and cited the petitioners' knowledge of the union constitution (normal retirement at 60) as justification for ruling their reliance was not reasonable. App. 18a.

As shown above, the panel majority also ruled that the early retirement contracts could not be enforced because they violated §501(a) and the union constitution. App. 21a-22a. This ruling mirrored the finding of illegality under the union constitution in the first district court opinion entered on January 17, 1997. App. 110a-111a. Therefore, the fatal error of the panel majority is that the first appeal reversed that first district court decision, and thereby rejected that illegality (under the constitution) defense as a bar to enforcement of the early retirement contracts under principles of agency law. Hence, in its illegality ruling based on the union constitution, the panel majority in this second appeal unlawfully assumed

the role of the first panel on a motion for rehearing by the respondents, six years after the first appeal decided on July 31, 1998; or, the panel majority unlawfully assumed the role of the Supreme Court on appeal by respondents from the first appeal. This usurping of the role of either the first panel or this Honorable Court is quite clear from a review of the record.

Not only did the first appeal reverse the illegality finding by the district court, but in the first appeal opinion the Sixth Circuit noted the union constitution provision that normal retirement is age 60. App. 79a-80a. Despite this constitutional provision, the Sixth Circuit ruled that principles of agency law would govern the case. 81a-82a. That ruling became the law of the case.

The actions of the majority panel in the second appeal violate the law of the case doctrine. Panels of the same court should not reverse or overrule one another. In *Agostini v. Felton*, 521 U.S. 203, 236 (1997), this Court held, ". . ., a court should not reopen issues decided in earlier stages of the same litigation." Similar expressions of this restriction is found in *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 815-816 (1988), and *Arizona v California*, 460 U.S. 605, 618 (1983). The rule is also applied by courts of appeal in deferring to earlier panel decisions. *United States v. Tocco*, 306 F.3d 279, 288 (CA 6, 2002); *Kennedy v. Lubar*, 273 F.3d 1293, 1298-1299 (CA 10, 2001); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (CA 9, 1995); 18B, Wright, Miller & Cooper, Federal Practice & Procedure, 4478.2, at 723-724.

D. Review is Warranted Because the Sixth Circuit Panel Majority Decision Conflicts With *U.S. v. Winstar Corp.*, 518 U.S. 839 (1996), and the Rule That a Party May Not Assert the Illegality Defense When That Party Has Created It or It Lies Within His Power to Remove

In responding to the threat[5] of IEB member Webb, that he would bring suit under §501 unless the respondent union abandoned the early retirement contracts, the union attorneys sent a letter to president McConville on January 4, 1995. In that letter, the union attorneys pointed out a simple amendment to article XI of the union constitution which would remove any impediment to enforcement of the early retirement contracts. App. 122a. And, the union constitution, at article III, authorized the IEB between conventions to amend the constitution by two-thirds vote until the next convention. App. 131a.

The fact that the respondent union did not undertake this simple solution to remove any legal impediment to performance means the union may not assert any illegality defense. Notably, the Sixth Circuit panel majority gave no logical reason why the IEB could not undertake this solution. App. 25a.

The panel majority, in refusing to recognize this contract principle that a party cannot rely upon a impediment to performance which lies within his power to remove, conflicts with *U.S. v. Winstar Corp.*, 518 U.S. 839 (1996). In that case, the United States had allowed the respondent financial institutions to use special accounting methods in their acquisitions of failing thrifts; and was challenged by the

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[5] This was only a threat; no §501 suit was ever filed, and the statute of limitations has long expired.

respondents for breach of contract when it discontinued those accounting methods in the passage of the Financial Institution Reform, Recovery, and Enforcement Act (FIRREA) in 1989. *Id.* at 847-848, 858. The Supreme Court refused to allow the government's sovereign acts defense because it held a government act cannot be public and general "if it has the substantial effect of releasing the Government from its contractual obligations. . ." *Id.* at 899. The Supreme Court found no reason to depart from the traditional rule that the impossibility defense is "traditionally unavailable where the barrier arises from the act of the party seeking discharge." *Id.* at 895.

Justice Scalia, in concurring, stated the rule against allowing the impossibility defense, as follows (518 U.S. 920):

> Generally, contract law imposes upon a party to a contract liability for any impossibility of performance that is attributable to that party's own actions. That is a reasonable estimation of what the parties intend. When I promise to do *x* in exchange for your doing *y*, I impliedly promise not to do anything that will disable me from doing *x*, or disable you from doing *y* – so that if either of our performances is rendered impossible by such an act on my part, I am not excused from my obligation.

This excellent statement of the principle demonstrates the error of the majority opinion below. Further, there is no explanation given in the majority opinion below as to how the union gets a "free pass" to simply ignore the recommendation of its own attorneys as to how to remove impediment to honor the union contracts.

Michigan law also recognizes the same principle that defendants may not assert the illegality (impossibility) defense because defendants may not profit from their failure to

undertake action which they knew would remove the purported legal impediment. See, *Dohanyos v. Prudential Insurance Company*, 952 F.2d 947, 950-951 (CA 6, 1992) (applying Michigan law); *Mehling v. Evening News Assoc.*, 374 Mich. 349, 132 N.W.2d 25, 26 (1965); *Malcolm MacDowell & Associates v. Ecorse-Lincoln Park Bank*, 325 Mich. 591, 38 N.W.2d 921, 923 (1949); *McCreery v. Green*, 38 Mich. 172, 181-182 (1878); *Stanton v. Dochille*, 186 Mich. App. 247, 463 N.W.2d 479, 484 (1990). Thus, defendants could have removed any constitutional or §501(a) problem by following the union attorney's solution; and cannot now be heard on any claim of illegality because they could have removed the obstacle.

E. Review is Warranted Because the Sixth Circuit Panel Majority Rejected the Doctrine of Ratification and Such Ruling Conflicts With *Federal Power Commission v. Colorado Interstate Gas Company*, 348 U.S. 492, 502 (1955), *Baker v. Cummings*, 181 U.S. 117, 130 (1901), and Universal Law That a Party May Not Challenge the Validity of a Contract After Accepting and Retaining the Benefits of the Contract

In part C above, petitioners pointed out the error of the Sixth Circuit majority opinion in violating the doctrine of law of the case. In the first appeal of this case, the Sixth Circuit ruled that the parties had formed a contract on December 8, 1994. App. 83a. In the second appeal, the panel majority ruled that the respondent union could lawfully eliminate petitioners' officer positions without paying petitioners their early retirement contracts. App. 27a. The panel majority had no right to so rule because the first appeal had ruled a contract between the parties came into existence on December 8, 1994; and the panel majority, in this second appeal, condoned a breach and repudiation of that contract.

The majority opinion also erred in rejecting the ratification doctrine. Petitioners have shown that by eliminating petitioners' positions the union has saved $1.6 million over five years over and above the costs of the early retirement contracts. Those savings have doubled because it is now 10 years since the events in late 1994 and early 1995. Having accepted the benefits of the transaction, respondents are precluded from challenging the validity of the early retirement contracts. In *Baker v. Cummings*, 181 U.S. 117, 130 (1901), the Supreme Court stated that rule as follows:

> A waiver of all right to question the validity of a contract may be found upon the claiming and acceptance of a benefit under it after full knowledge of all the facts. 2 Pom. Eq. Juris. 2d ed. § 897, and cases cited in note 1.

Later, in *Federal Power Commission v Colorado Interstate Gas Company*, 348 U.S. 492, 502 (1955), the Supreme Court restated the rule as follows:

> After the merger was approved on that condition, respondent sought no review of it. On the other hand, respondent consummated the merger and has enjoyed its benefits ever since. It cannot now be allowed to attack an officially approved condition of the merger while retaining at the same time all of its benefits.

The Sixth Circuit recognized this rule in *Atlantic Richfield Company v. Malco Petroleum, Inc.*, 471 F.2d 1258, 1260 (CA 6, 1972). Michigan also follows that rule. *Southfield Woods Water Company v. Commissioner of State Department of Health*, 352 Mich. 597, 90 N.W.2d 850, 851 (1958); *Schnack v. Applied Arts Corp.*, 283 Mich. 434, 278 N.W. 117, 120 (1938).

Application of the cited rule precludes the respondents from challenging the validity of the early retirement contracts under §501 of the LMRDA.

CONCLUSION

The Sixth Circuit panel majority decision is such an egregious departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power; and a gross rejection of several relevant and binding Supreme Court decisions.

Inter alia, the panel majority violated the separation of powers and U.S. Const. art I, §1, by rewriting §501(a) of the LMRDA to create an affirmative defense for the respondent union to defeat enforcement of the early retirement contracts it initiated and induced petitioners to accept and execute. Such ruling conflicts with numerous Supreme Court decisions ruling that courts are to interpret the law, but have no right to rewrite federal statutes or make new law. Such ruling also conflicts with *M.C.I. Telecommunications, Inc. v. American Tel. & Tel.*, *supra*, which held that courts are bound to follow the means specified by Congress for the pursuit of statutory purposes.

Clearly, the express "gatekeeper" provisions and procedural framework of §501(b), as established by Congress, were ignored by the 2 to 1 decision below to create a brand new affirmative defense, and a means for union management, not union members, to invoke §501. However, there is not a hint in the language or framework of §501 that such use was either envisioned or intended by Congress.

Next, in dismissing petitioners' ERISA claims upon the finding that the early retirement contracts were illegal under §501(a), the Sixth Circuit panel majority ignored and rejected *Lockheed Corporation v. Spink, supra,* and *Hughes Aircraft Co. v. Jacobson, supra,* which ruled that employers or plan

sponsors are not acting in a fiduciary capacity in amending a pension plan, or in adding a new benefit structure to an existing plan; and said binding precedent means there was no §501(a) violation when the IEB members voted on the December 7, 1994 resolution which amended the Officers' Retirement Plan. In both of these rulings, the Sixth Circuit panel majority has so far departed from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's supervisory power.

The Sixth Circuit panel majority, in ruling that the respondent union could lawfully eliminate petitioners' officer positions without paying them their early retirement benefits, violated this Court's rulings on law of the case because the first appeal ruled that a contract existed on petitioners' acceptance on December 8, 1994 of the December 7, 1994 resolution and offer of early retirement; and such ruling condoned a breach of contract.

The fact that union attorneys had proposed an amendment to the union constitution which would have removed any constitutional impediment to performance, and the fact that the union constitution could be amended between conventions, means the Sixth Circuit panel majority had no right to dismiss the ERISA claims on the asserted reason they violated the union constitution. Such ruling directly conflicts with *U.S. v. Winstar Corp., supra,* and the rule that a party may not assert the illegality defense which he has created or it lies within his power to remove.

Finally, the Sixth Circuit panel majority erred in its illegality ruling because, by accepting and retaining the cost saving benefits from the elimination of petitioners' officer positions, respondents are precluded from challenging the validity of the transaction. Such ruling conflicts with *Federal Power Commission v. Colorado Interstate Gas Company,*

supra, Baker v. Cummings, supra, and universal law recognizing that rule of ratification.

For these reasons, the petition for writ of certiorari should be granted. And for those same reasons, this Court should reverse the Sixth Circuit panel majority decision.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-1253

[Filed September 10, 2004]

GARY ANDERSON, ET AL.,
Plaintiffs-Appellees,

v.

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA (UPGWA), ET AL.,
Defendants-Appellants.

BEFORE: MERRITT, MOORE, and GILMAN, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Merritt would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/_____

Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-1253

[Filed June 7, 2004]

GARY ANDERSON, LOUIS SCOHY, and GEORGE SQUIER, Plaintiffs-Appellees,

v.

THE INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA (UPGWA), INTERNATIONAL EXECUTIVE BOARD OF THE UPGWA, PENSION COMMITTEE OF THE UPGWA, AND RETIREMENT PLAN OF THE UPGWA, Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
No. 96-70710
Gerald E. Rosen, District Judge

Before: MERRITT, MOORE, and GILMAN, Circuit Judges.

OPINION

KAREN NELSON MOORE, Circuit Judge. This appeal addresses the question of whether the doctrine of apparent authority bound a union to its officers' self-dealing transaction entered into in clear violation of the union's constitution. We hold that it did not.

Gary Anderson ("Anderson"), Louis Scohy ("Scohy"), and George Squier ("Squier"), Plaintiffs-Appellees, are all former officers of Defendant-Appellant, International Union, United Plant Guard Workers of America ("UPGWA"). The other defendants in this action are the International Executive Board of the UPGWA ("IEB"), the Pension Committee of the UPGWA ("Pension Committee"), and the retirement plan of the UPGWA ("Retirement Plan"). While Plaintiffs-Appellees were officers of UPGWA and members of the IEB, they voted in favor of resolutions that would eliminate their positions as officers and provide them with early-retirement benefits above those permitted by UPGWA's constitution. After the IEB was threatened with litigation, it deferred implementation of the increased early-retirement benefits until presentation for a vote at the upcoming International Convention. Subsequently, none of the Plaintiffs-Appellees continued in their positions as officers, and the International Convention voted against a resolution providing for the increased early-retirement benefits.

Plaintiffs-Appellees brought suit in the United States District Court for the Eastern District of Michigan, asserting that this denial of the promised early-retirement benefits violated several provisions of the Employee Retirement Income Security Act ("ERISA") of 1974. After the district court granted summary judgment to Defendants-Appellants on all of Plaintiffs-Appellees' claims, a panel of this court

reversed and remanded, requesting the district court to make further factual findings on the issue of whether the Union President and the IEB had apparent authority to bind UPGWA to the December 7, 1994 resolution. On remand, the district court denied the parties' cross-motions for summary judgment, conducted a bench trial, and issued an opinion concluding that the Union President and the IEB did have apparent authority to so bind UPGWA, and accordingly awarded Plaintiffs-Appellees the increased early-retirement benefits.

We conclude that Plaintiffs-Appellees could not have *reasonably* relied on the Union President's or the IEB's representations because the increased early-retirement benefits clearly violated UPGWA's constitution. Moreover, we will not enforce this contract, which Plaintiffs-Appellees entered into in violation of their fiduciary duties under § 501(a) of the Labor-Management Reporting and Disclosure Act ("LMRDA") of 1959. Therefore, we REVERSE the district court's judgment awarding Plaintiffs-Appellees the increased early-retirement benefits.

I. OVERVIEW

A. Factual Background

Plaintiffs-Appellees are former officers of UPGWA and former members of the IEB. UPGWA is a union that represents "Plant Guards, Security Officers, Security Police Officers, fire protection and other employees performing protection and security activities for private and governmental employers." Joint Appendix ("J.A.") at 307 (UPGWA Const. Art. II). UPGWA's officers are elected "at the union's convention which is held every five years." J.A. at 22 (Dist.

Ct. Op. 1/17/97).[1] Anderson and Squier were elected regional directors for UPGWA in 1990, and their terms both expired in 1995. Scohy was a vice-president of UPGWA, who was also elected in 1990, and his term also expired in 1995.

In 1993 and 1994, while Plaintiffs-Appellees were in office, "the UPGWA experienced severe financial difficulties and the IEB began exploring ways to cut costs and save money. In November 1994, in order to stem the union's financial losses, UPGWA President Eugene McConville [("McConville")] proposed that the union be restructured so as to eliminate some regional directorships as well as the position of vice-president." J.A. at 23 (Dist. Ct. Op. 1/17/97). As part of this restructuring, McConville proposed offering early retirement to all full-time officers and directors who met certain eligibility requirements. McConville further proposed that the IEB effectuate the restructuring and offer the early-retirement benefits in February 1995, rather than wait for approval "at the international convention in May 1995, because the union's accountants had advised that there would be a large savings to the union if it could eliminate the full-time positions prior to the convention." J.A. at 23 (Dist. Ct. Op. 1/17/97).

The IEB held a special meeting on December 6 through 9, 1994, to consider various cost-cutting measures, including McConville's restructuring and early-retirement proposal. At the special IEB meeting, David Kaufman ("Kaufman"), UPGWA's accountant, made a presentation detailing the state

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[1] We are relying upon the district court's January 17, 1997 summary judgment opinion for uncontested background facts, and upon the district court's January 4, 2001 bench trial opinion for further factual findings, except to the extent that we consider those factual findings to be clearly erroneous.

of UPGWA's finances and the cost savings projected for McConnville's restructuring and early-retirement proposal. Kaufman reported to the IEB that eliminating the vice-president's position would save UPGWA $535,000 over five years and that eliminating three regional directors would save UPGWA an additional $1.70 million over five years. The resolution proposed by McConville contemplated offering early retirement to officers and directors who met the following eligibility requirements:

1. Must be 50 years of age or over as of December 31, 1994.

2. Retirement must cause one full-time position to be eliminated.

3. Retirement must be taken on February 15, 1995.

4. Acceptance of this window must be made by December 8, 1994.

J.A. at 25 (Dist. Ct. Op. 1/17/97). The resolution further specified that the early-retirement package would contain the following benefits:

1. An officer or director will receive ten (10) years allocated to age and/or service, at their discretion for pension benefit computation.

2. An officer or director shall be entitled to all benefits as stated in Article XI, Sections 1 and 2(e) of the Constitution and By-Laws of the

> International Union, United Plant Guard Workers of America (UPGWA), dated May 19, 1990.

J.A. at 25 (Dist. Ct. Op. 1/17/97).

The district court found that absent the December 7, 1994 resolution, none of the Plaintiffs-Appellees would have been eligible for early retirement under the Retirement Plan, and that UPGWA's constitution prohibited offering early retirement to Plaintiffs-Appellees. Article XI, Section 2 of UPGWA's constitution provides:

> The International Executive Board is empowered to formulate, maintain, and amend a Pension Retirement Plan to include, but *not to exceed the following*:
>
> (A) All full-time elected officers and appointed International Union representatives who have *at least five years of service* shall be eligible under such Plan.
>
> (B) The normal retirement age shall be Sixty (60) years. Disability and early retirement benefits *shall be in accordance with the normal retirement age*.[2]

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[2] Article III of UPGWA's constitution specifies that the constitution "can be amended only by a majority vote of the delegates at succeeding Conventions; provided, however, that during the interim between Conventions, this Constitution and By-Laws can be amended by a majority vote of the total International Membership voting in all Local Unions." J.A. at 307. This article further provides that the IEB, by a two-thirds vote, is empowered "to make such interim changes in this Constitution and By-Laws applicable only until the next regular Constitutional Convention, *as*

J.A. at 310 (UPGWA Const. Art. XI, § 2 (emphases added)). Under the Retirement Plan, "a covered employee is entitled to full retirement only if he is at least 60 years of age, or a reduced retirement benefit if he is under age 60 but over age 55 and has completed at least five years of service. No provision is made for retirement under age 55."[3] J.A. at 25-26 (Dist. Ct. Op. 1/17/97). To be eligible for either normal or early-retirement benefits under the Retirement Plan, employees must have completed five years of service. As of February 15, 1994, neither Anderson nor Scohy was fifty-five years old and neither had completed at least five years of service; Squier was fifty-nine years old, but had not completed at least five years of service.

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may from time to time be necessary to conform this Constitution and By-Laws with any applicable laws." J.A. at 307-08 (UPGWA Const. Art. III) (emphasis added).

McConnville conceded at trial that the early-retirement benefits embodied in the December 7, 1994 resolution "were not 'in accordance with normal retirement age' under Article XI, Section 2(b)." J.A. at 616 (Dist. Ct. Op. 1/4/01).

[3] Article XI of UPGWA's Retirement Plan specifies that the IEB has "the right at any time and from time to time to terminate, modify or amend in whole or in part any or all of the provisions of the Plan." J.A. at 292. The IEB is designated as the "Plan Administrator" for purposes of the Employee Retirement Income Security Act ("ERISA") of 1974, but a Pension Committee, composed of three members designated by the IEB, is responsible for daily administration and interpretation of the Retirement Plan. When the events giving rise to this litigation occurred, Scohy was the Chairman of the Pension Committee.

On December 7, 1994, before voting on the early-retirement proposal, Plaintiffs-Appellees asked Gordon Gregory ("Gregory"), UPGWA's attorney, whether he foresaw any legal problems with the early-retirement proposal. According to Anderson and Scohy, Gregory told them that he was not aware of any problems. However, two days earlier, on December 5, 1994, Gregory had written to McConville stating the opinion "that he believed that it was likely that there would be an administrative and/or judicial challenge to the early retirement window based upon a violation of Article XI, Section 2 of the Union Constitution and Section 501(a) of the Labor Management Reporting and Disclosure Act." J.A. at 26 (Dist. Ct. Op. 1/17/97). Although it is not reflected in the district court's January 4, 2001 opinion, at trial all of the Plaintiffs-Appellees testified that Article XI, Section 2 of the UPGWA's Constitution was discussed at the IEB meeting prior to the vote on the early-retirement proposal.

On December 7, 1994, the IEB voted in favor of adopting the early-retirement proposal by a margin of eight in favor and three against; Plaintiffs-Appellees all voted in favor of the proposal.[4] On December 8, 1994, Plaintiffs-Appellees all accepted in writing the increased early-retirement benefits. According to their acceptance letters, Anderson would receive a monthly pension of $1,682.95, Scohy would receive a monthly pension of $3,437.87, and Squier would receive a monthly pension of $2,478.82.

"On December 9, [1994], the IEB passed another resolution, this one consolidating, rearranging, and dissolving

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[4] Jack Webb, Ronald Warfield, and Denise Sylvestre voted against the December 7, 1994 resolution.

certain regions." J.A. at 30 (Dist. Ct. Op. 1/17/97). The regions for which Squier and Anderson had been directors were "to be dissolved effective February 15, 1995, i.e., the date on which Plaintiffs retirements under the December 7 resolution were to become effective." J.A. at 30 (Dist. Ct. Op. 1/17/97). The resolution did not eliminate the vice-president's position held by Scohy because that required amending UPGWA's constitution through a vote at the International Convention in May 1995.

On December 22, 1994, Jack Webb ("Webb"), a regional director, wrote a letter to McConville asserting that by voting in favor of the increased early-retirement benefits, members of the IEB violated Article XI, Section 2 of UPGWA's constitution and their fiduciary duties, and threatening to sue if the IEB did not withdraw the December 7, 1994 resolution. In an opinion letter written on January 4, 1995, Gregory confirmed the possibility of a viable legal challenge to the early-retirement benefits embodied in the December 7, 1994 resolution. On January 5, 1995, in response to Webb's threatened lawsuit, McConville circulated a referendum ballot to members of the IEB asking whether they wanted to delay implementation of the early-retirement benefits and restructuring until authorized through a vote at the International Convention. The IEB voted to defer implementation of the resolutions until the International Convention, and the Plaintiffs-Appellees continued in their offices until that time. At the International Convention, Squier "ran for re-election as regional director, but lost. Anderson did not seek re-election," and the membership voted to eliminate the vice-president's position held by Scohy. J.A. at 33 (Dist. Ct. Op. 1/17/97). Additionally, the membership voted against adopting the increased early-retirement benefits.

B. Procedural Background

Plaintiffs-Appellees filed various lawsuits against UPGWA and other defendants, including two state-court actions and this federal action asserting ERISA violations. On January 17, 1997, the district court issued an opinion rejecting all of Plaintiffs-Appellees' ERISA claims and granting summary judgment to Defendants-Appellants. Then, on July 31, 1998, a panel of this court reversed and remanded, indicating that the relevant issue was whether McConville and the IBE had apparent authority to bind UPGWA to the December 7, 1994 resolution. *Anderson v. Int'l Union, United Plant Guard Workers*, 150 F.3d 590, 592 (6th Cir. 1998).

In this court's 1998 opinion, the panel explained that "apparent authority (1) results from a manifestation by a person that another is his agent, regardless of whether an actual agency relationship has been formed and (2) exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized." *Id.* at 593. Because the record on the issue of apparent authority was limited, the panel remanded this case instructing the district court "to make further factual findings on *whether* principles of apparent authority can bind the union to the December 7, 1994 resolution." *Id.* (emphasis added). More specifically, the panel instructed the district court to:

> determine if union president McConville, as president of the union and a member of the [IEB], and the [IEB], were acting within their apparent or actual authority as representatives of the union's retirement plan and whether plaintiffs reasonably relied upon this authority to enter into the agreement for early retirement benefits. Whether plaintiffs' reliance was reasonable may turn, in part, on whether they were

> aware of the possible legal challenges to the December 7, 1994, resolution before they accepted the early retirement offer.

Id. (citations omitted). The panel further instructed that, "Apparent authority . . . may attach even when the agent's acts are unauthorized [and] that even in the presence of a ratification requirement, a third party may rely upon the apparent authority of the union representatives to enter into an agreement where there is a reasonable basis for such reliance." *Id.*

On August 31, 1999, the district court issued an opinion denying the parties' post-remand motions for summary judgment. The court concluded that Article XI, Section 1 of the UPGWA Retirement Plan, Article XII, Section 5 of the UPGWA constitution, and McConville's statements manifested apparent authority in McConville and the IEB to offer the early-retirement benefits encompassed in the December 7, 1994 resolution. The district court found it relevant that the Retirement Plan document provides: "The Union, **acting through its International Executive Board,** reserves and **shall have the right at any time and from time to time** to terminate, **modify or amend in whole or in part any and all provisions in the Plan.**" J.A. at 74 (Dist. Ct. Op. 8/31/99) (emphases in original). The district court also found it relevant that the UPGWA constitution "provides that the IEB 'shall decide all questions involving interpretation of this Constitution and By-Laws, between Conventions." J.A. at 75. Additionally, the district court found that prior to their accepting the early-retirement benefits, McConville assured Plaintiffs-Appellees that the early-retirement proposal had been checked by the attorneys and accountants and was legal, and that Gregory had assured Plaintiffs-Appellees that the early-retirement proposal was legal.

In its August 31, 1999 opinion, the district court also concluded, however, that there was a genuine issue of material fact regarding whether Plaintiffs-Appellees' reliance on these manifestations of apparent authority was reasonable. J.A. at 77 (Dist. Ct. Op. 8/31/99). The district court noted that "whether Plaintiffs' reliance was reasonable turns on whether they were aware of the [UPGWA] constitution's requirement of a vote of the full membership on the early retirement proposal and whether they were aware of the possible legal challenges to the December 7, 1994 resolution before they accepted the early retirement offer." J.A. at 77 (Dist. Ct. Op. 8/31/99) (citing *Anderson*, 150 F.3d 590)). The district court found that the parties had presented conflicting testimony regarding whether the Plaintiffs-Appellees were told prior to accepting the early-retirement proposal that there was the possibility of a legal challenge to the December 7, 1994 resolution, thereby creating a genuine issue of material fact and precluding summary judgment.

The district court conducted a six-day bench trial in December 1999. After hearing testimony and considering exhibits, the district court issued an opinion on January 4, 2001. In its opinion, the district court adhered to its previous conclusion that UPGWA manifested authority in the IEB and McConville to offer the early-retirement benefits. Based upon testimony heard at trial, the district court then concluded that Plaintiffs-Appellees' reliance on the IEB's and McConville's manifestations of authority was reasonable. Specifically, Ronald Warfield ("Warfield"), an IEB member and also a Pension Committee member, testified that the Retirement Plan could be amended via an IEB resolution. Additionally, all three Plaintiffs-Appellees testified that they relied upon Gregory's assurances "that there were no legal problems with the early retirement proposals." J.A. at 643 (Dist. Ct. Op. 1/4/01). Although Gregory testified that he told Plaintiffs-

Appellees that he had written on December 5, 1994, an opinion letter for McConville explaining the possibility of a § 501 challenge, the district court credited Plaintiffs-Appellees' testimony that Gregory had not told them about the letter. Moreover, all of the witnesses at trial, including Gregory and Webb, testified that in response to an inquiry by Webb, Gregory had stated that he was not aware of any legal problems with the early-retirement proposal under either Article XI, Section 2 of UPGWA's constitution or under § 501 of the LMRDA. Because Gregory had been UPGWA's legal counsel for more than thirty-five years, the district court found "that it was reasonable for Plaintiffs to rely upon Mr. Gregory's assurances that there were no legal problems with the early retirement plan." J.A. at 643-44 (Dist. Ct. Op. 1/4/01). Moreover, the district court found that even if Plaintiffs-Appellees may have heard that Webb might challenge the early retirement proposals, it was reasonable for Plaintiffs-Appellees to rely upon Gregory's and McConville's assurances that there were no legal problems with the plan. Therefore, the court concluded that Plaintiffs-Appellees "reasonably relied upon the apparent authority of the IEB to adopt the Resolution on December 7, 1994 providing for an early retirement plan in accepting early retirement pursuant to that Resolution on December 8, 1994" and that UPGWA "is bound by the terms of the resolution passed December 7, 1994 modifying the UPGWA Retirement Plan to grant early retirement benefits to Plaintiffs." J.A. at 645 (Dist. Ct. Op. 1/4/01).

All defendants timely appealed the district court's January 4, 2001 order.

II. ANALYSIS

A. Standard of Review

"In considering a district court's decision following a bench trial," we review for clear error the district court's findings of fact, and we review de novo the district court's conclusions of law. *Overton Distribs., Inc. v. Heritage Bank*, 340 F.3d 361, 366 (6th Cir. 2003) (internal quotation marks omitted). When deciding cases that turn upon the interpretation of a union's constitution, "Courts are reluctant to substitute their judgment for that of union officials in the interpretation of the union's constitution, and will interfere only where the official's interpretation is not fair or reasonable." *United Food & Commercial Workers Int'l Union Local 911 v. United Food & Commercial Workers Int'l Union*, 301 F.3d 468, 478 (6th Cir. 2002) (quoting *United Bhd. of Carpenters, Dresden Local No. 267 v. United Bhd. of Carpenters, S. Cent. Ohio Dist. Council*, 992 F.2d 1418, 1423 (6th Cir. 1993)).

B. Apparent Authority

When we remanded this case, we instructed the district court to make further findings on the issue of *whether* McConville or the IEB had apparent authority to bind UPGWA to the early-retirement benefits embodied in the December 7, 1994 resolution. *Anderson*, 150 F.3d at 592-93. After conducting a bench trial, the district court found that UPGWA manifested to Plaintiffs-Appellees that McConville and the IEB were its agents for the purposes of amending the Retirement Plan, and that Plaintiffs-Appellees' reliance upon those manifestations was reasonable; therefore, the district court concluded that McConville and the IEB had apparent authority to bind UPGWA to December 7, 1994 resolution.

Although we commend the district court for its thorough and thoughtful opinion, we conclude that the district court committed clear error by finding that the Plaintiffs-Appellees' reliance on McConville's and the IEB's ostensible authority to bind UPGWA in this manner was reasonable.

An agent acting with apparent authority may bind his or her principal to a contract with a third party. *Id.* As we explained in *Anderson*, apparent authority arises in situations when the principal manifests to a third party that an agent is authorized to act upon the principal's behalf and the third party reasonably relies upon that authority. A third party may not, however, *reasonably* rely upon an agent's ostensible authority if the third party knows that the agent is not authorized to act in a particular manner. *See Dayton Bread Co. v. Montana Flour Mills Co.*, 126 F.2d 257, 261 (6th Cir. 1942). In *Dayton Bread Co.*, we held that the third party did not reasonably rely upon the agent's authority to bind the principal because it is well established that a salesman "has no implied authority to bind his principal by an absolute sale or contract," and because the contracts at issue were prohibited under applicable law. *Id.* In *Dayton Bread Co.*, we explained

> The principal is often bound by the acts of his agent in excess of or in abuse of his actual authority, but this is only true between the principal and third persons who, *believing and having a right to believe that the agent was acting within and not exceeding his authority*, would sustain a loss if the act was not considered that of the principal. . . . If . . . a third person dealing with an agent *knows he is acting under a circumscribed and limited authority and that his act*

> *is in excess of or an abuse of the authority actually conferred, then clearly the principal is not bound.*

Id. (emphases added).[5]

In this case, Plaintiffs-Appellees had actual knowledge of the limitations on pension benefits imposed by Article XI, Section 2 of UPGWA's constitution and should have known the appropriate procedures for amending UPGWA's constitution.[6] Although Plaintiffs-Appellees may have believed that McConville and the IEB had the authority to bind UPGWA to the December 7, 1994 resolution, we conclude that Plaintiffs-Appellees' actual knowledge and imputed knowledge made this reliance unreasonable. Therefore, we conclude that McConville and the IEB did not have apparent authority to offer the increased early-retirement benefits, and

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[5] Although *Dayton Bread Co. v. Montana Flour Mills Co.*, 126 F.2d 257 (6th Cir. 1942), is a diversity case applying Ohio law, we find its discussion of general agency principles instructive and consistent with other authorities. *See Branding Iron Motel, Inc. v. Sandlian Equity, Inc. (In re Branding Iron Motel, Inc.)*, 798 F.2d 396, 401 (10th Cir. 1986); *Pasco County Peach Ass'n v. J.F. Solley & Co.*, 146 F.2d 880, 883 (4th Cir. 1945); Harold Gill Reuschlein & William A. Gregory, *The Law of Agency and Partnership* 63-64 (2d ed. 1990).

[6] Plaintiffs-Appellees' actual and imputed knowledge sufficiently distinguishes the present case from *Central States Southeast & Southwest Areas Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098 (6th Cir. 1986) (en banc), *cert. denied*, 479 U.S. 1086, 107 S. Ct. 1291, 94 L. Ed. 2d 147 (1987), in which we held that a union's agent could bind the union based upon the doctrine of apparent authority even in the presence of a membership-ratification requirement.

thus UPGWA is not bound by the December 7, 1994 resolution.[7]

C. Section 501 of the LMRDA

As an alternative basis for our holding, we conclude that Plaintiffs-Appellees may not enforce the increased early-retirement benefits because Plaintiffs-Appellees violated § 501(a) of the LMRDA. Section 501 of the LMRDA imposes fiduciary duties upon the officers and agents of labor unions and provides union members with a cause of action against union officers and agents who violate those duties. Section 501(a)[8] defines the scope of union officers' and agents'

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[7] Although throughout much of this litigation the parties have focused on ERISA, we note that our outcome today does not disrupt the terms of an ERISA plan. Plaintiffs-Appellees may not claim benefits under the terms of the Retirement Plan because the plan was never validly amended. *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 403 (6th Cir.) (en banc), *cert. denied*, 524 U.S. 923, 118 S. Ct. 2312, 141 L. Ed. 2d 170 (1998). As will be discussed below, Plaintiffs-Appellees have not established all of the elements of estoppel. Moreover, even if Plaintiffs-Appellees had established all of the elements of estoppel, we are reluctant "to allow estoppel to override the clear terms" of an ERISA plan. *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 456 (6th Cir. 2003).

[8] Subsection (a) provides, in pertinent part:

> The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to *manage,*

fiduciary duties, and § 501(b) specifies prerequisites to bringing suit to redress violations of § 501(a). We recognize that when defining the scope of fiduciary duties imposed by § 501(a), courts must be cognizant of "the special problems and functions of a labor organization." 29 U.S.C. § 501(a). We also recognize, however, that Congress passed § 501(a) to curb abusive practices by union officials. *Morrissey v. Curran*, 650 F.2d 1267, 1272-73 (2d Cir. 1981). Although the precise contours of the fiduciary duties imposed by § 501(a) are not fully delineated in the statutory text, it is clear that Congress intended unions' constitutions and by-laws to play a major role in shaping these duties. *See Guzman v. Bevona*, 90 F.3d 641, 648 (2d Cir. 1996). Section 501(a) directs union officers and agents to expend the union's money and property, "*in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder.*" 29 U.S.C. § 501(a) (emphasis added). We have previously held that union officers and agents violate § 501(a) by engaging in transactions that provide a direct personal benefit to themselves and that contravene their union's constitution. *McCabe v. Int'l Bhd. of Elec. Workers Local*

> *invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization*, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.
>
> 29 U.S.C. § 501(a).

Union No. 1377, 415 F.2d 92, 97-98 (6th Cir. 1969) (holding that union officers violated § 501(a) by accepting reimbursement for out-of-pocket expenses incurred while conducting union business in addition to per diem payments that were not authorized by their union's constitution).[9] Although § 501(a) imposes fiduciary duties beyond those outlined in a union's constitution and by-laws, it is not necessary for us to expound upon the boundaries of § 501(a) because in this case the early-retirement benefits Plaintiffs-Appellees seek to enforce violate UPGWA's constitution.

UPGWA's constitution empowers the IEB to create a pension plan for all full-time officers and appointed representatives. J.A. at 310 (UPGWA Const. Art. XI, § 2). UPGWA's constitution specifies, however, that only full-time officers and union representatives who have attained at least five years of service are eligible for pension benefits. Moreover, UPGWA's constitution specifies that qualifying individuals may receive normal retirement benefits at age sixty and that "early retirement benefits *shall be in accordance with the normal retirement age*." J.A. at 310 (emphasis added). It is clear that UPGWA's constitution allows for early-retirement benefits to be offered only on a

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[9] Our position is consistent with other circuits that have addressed this issue. *See, e.g.*, *Guzman v. Bevona*, 90 F.3d 641, 647-48 (2d Cir. 1996) (holding that union officers violated § 501(a) by expending union funds on surveillance of union member, who criticized the union's leadership, in violation of the union's constitution); *Brink v. Da Lesio*, 667 F.2d 420 (4th Cir. 1981); *Stelling v. Int'l Bhd. of Elec. Workers Local Union No. 1547*, 587 F.2d 1379 (9th Cir. 1978), *cert. denied*, 442 U.S. 944, 99 S. Ct. 2890, 61 L. Ed. 2d 315 (1979); *Sabolsky v. Budzanoski*, 457 F.2d 1245 (3d Cir.), *cert. denied*, 409 U.S. 853, 93 S. Ct. 65, 34 L. Ed. 2d 96 (1972).

reduced basis, and also requires pension recipients to have worked for UPGWA for at least five years; a contrary interpretation would be unreasonable and not entitled to deference. It is undisputed that as of December 7, 1994, Plaintiffs-Appellees were not entitled to any retirement benefits under the Retirement Plan and that the early-retirement benefits encompassed in the December 7, 1994 resolution exceeded the limits imposed by UPGWA's constitution. Plaintiffs-Appellees were to receive a direct personal benefit from the December 7, 1994 resolution, because at that time none of them were eligible for any retirement benefits. Additionally, the retirement benefits embodied in the December 7, 1994 resolution exceeded the limits imposed by UPGWA's constitution, and the IEB did not amend the constitution.[10] Therefore, we conclude that Plaintiffs-Appellees violated their fiduciary duties under § 501(a).[11] This conclusion does not end our analysis, however, because Defendants-Appellants did not bring a § 501 suit against Plaintiffs-Appellees.

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[10] Moreover, the IEB could not have amended UPGWA's constitution in this manner, as the IEB is only authorized to amend temporarily the constitution to conform the constitution to changes in the law. J.A. at 307-08 (UPGWA Const. Art. III).

[11] Because the December 7, 1994 resolution was not validly authorized by the International Convention, *see supra* Part II.B., the more deferential "manifestly unreasonable" standard that the Second Circuit first enunciated in *Morrissey v. Curran*, 650 F.2d 1267, 1274 (2d Cir. 1981), is inapplicable. In *Morrissey*, the Second Circuit held that authorization is not a complete defense to self-dealing transactions entered into by union officers and agents, but that if such transactions are validly authorized, then courts should not interfere unless the transaction "is so manifestly unreasonable as to evidence a breach of fiduciary obligation imposed by § 501(a)." *Id.*

The procedural posture of this case is unique, in that neither UPGWA nor its members brought a § 501 action against Plaintiffs-Appellees; rather Defendants-Appellants assert that § 501(a) provides a defense to Plaintiffs-Appellees' breach of contract action. No circuit has yet issued a published opinion expressly deciding whether § 501(a) can be asserted as a defense to a breach of contract action. *But see Trs. of the Operative Plasterers' & Cement Masons' Local Union Officers & Employees Pension Fund v. Journeymen Plasterers' Protective & Benevolent Soc'y, Local Union No. 5*, 794 F.2d 1217, 1220 (7th Cir. 1986) [hereinafter *Cement Masons*] (questioning whether § 501(a) can be raised as a defense to a breach of contract action because a violation of § 501(a) does not render a contract intrinsically illegal). A basic principle of contract law supports our conclusion that § 501(a) can be asserted as a defense to this breach of contract action.

Federal courts may not enforce a contract if the result would be to compel a violation of the law. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77, 102 S. Ct. 851, 70 L. Ed. 2d 833 (1982). As explained above, the early-retirement benefits resolution violated § 501(a) of the LMRDA. In *Kaiser Steel*, the Supreme Court refused to enforce a collective bargaining agreement provision that was illegal under federal labor and antitrust laws. *Kaiser Steel*, 455 U.S. at 85-87. It is true that the federal labor and antitrust laws at issue in *Kaiser Steel* made intrinsically illegal the collective bargaining provision under consideration, whereas § 501(a) does not make intrinsically illegal the early-retirement proposal; however, we do not think that this distinction warrants a different result in this case. *See id*; *Trustees of Operative Plasterers' & Cement Masons' Local Union Officers & Employees Pension Fund v. Journeymen Plasterers' Protective & Benevolent Soc., Local Union No. 5*, 794 F.2d at 1220. A union or its

members can ordinarily obtain an injunction prohibiting payments that were authorized by union officers in breach of their fiduciary duties or obtain reimbursement for such payments. 29 U.S.C. § 501(a); *see also Guzman*, 90 F.3d at 648; *Council 49, Am. Fed'n of State, County & Mun. Employees Union v. Reach*, 843 F.2d 1343, 1347-49 (11th Cir. 1988); *Kerr v. Shanks*, 466 F.2d 1271, 1276 (9th Cir. 1972); *McCabe v. International Brotherhood of Elecrical Workers*, 415 F.2d at 98; *Local No. 92, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers v. Norris*, 383 F.2d 735, 737-40 (5th Cir. 1967).

In the case at bar, because the IEB deferred implementation of the increased early-retirement benefits and the International Convention ultimately voted against their implementation, an injunction against implementation of the benefits was not a possibility. Denying UPGWA and its members use of § 501(a) as a defense in this situation, where they were unable to use it offensively, makes little sense and would thwart the purposes of that provision.[12] Moreover, "Refusing to enforce a promise that is illegal under the antitrust or labor laws is not providing an additional remedy contrary to the will of Congress. . . .Any one sued upon a contract may set up as a defense that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defense to the action." *Kaiser Steel*, 455 U.S. at 82 n.7 (quotation omitted).

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[12] Because § 501(a) is being raised as a defense, neither Michigan's statute of limitations for breach of fiduciary duty claims nor the doctrine of laches prevents Defendants-Appellants from relying upon this provision. Likewise, the procedural requirements contained in § 501(b) are not applicable.

Plaintiffs-Appellees argue that UPGWA may not rely upon illegality as a defense to enforcement of the early-retirement benefits because either the IEB or the convention delegates could have eliminated the § 501 problem by amending UPGWA's constitution. We reject this argument. First, the IEB did not have the authority to amend UPGWA's constitution in this manner. Second, if UPGWA was required to amend its constitution when its officers exceeded their powers thereunder, the constitution would not serve its purpose of limiting the officers' powers. Third, we question whether a vote to amend UPGWA's constitution could cure after-the-fact this self-dealing violation of § 501(a). *See* Janice R. Bellace & Alan D. Berkowitz, *THE LANDRUM-GRIFFIN ACT: Twenty Years of Federal Protection of Union Members' Rights* 299 (1979).

Therefore, we hold that § 501(a) can properly be raised by a union or its members as a defense to a transaction entered into by union officials, which grants those officials a direct personal benefit in violation of the union's constitution. This holding is necessary to ensure that union officers or agents do not thwart the purposes of § 501(a) by binding unions to contracts with union officials that violate this provision.

D. Estoppel and Ratification

Our holding that the December 7, 1994 resolution constitutes an unenforceable contract should not be interpreted as foreclosing the possibility of estoppel in an appropriate case. This, however, is not an appropriate case.

> The elements of estoppel are: (1) conduct or language amounting to a representation of fact; (2) the party to be estopped must be aware of the true facts; (3) the

> party to be estopped must intend that the representation be acted on such that the party asserting the estoppel has the right to believe it was so intended; (4) the party asserting the estoppel must be unaware of the true facts; and (5) the party asserting the estoppel must detrimentally and justifiably rely on the representation.

Brown-Graves Co. v. Central States, Southeast & Southwest Areas Pension Fund, 206 F.3d 680, 684 (6th Cir. 2000). Here, Plaintiffs-Appellees did not detrimentally or justifiably rely upon the December 7, 1994 resolution. In January 1995, the IEB voted to rescind the resolutions authorizing the increased early-retirement benefits, and Plaintiffs-Appellees all continued in their respective offices until the end of their terms in May 1995. Therefore, Plaintiffs-Appellees did not rely to their detriment on the increased early-retirement benefits. As discussed above, the IEB exceeded its authority under UPGWA's constitution in offering the early-retirement benefits, and Plaintiffs-Appellees had actual knowledge of the limitations imposed by Article XI, Section 2 of UPGWA's constitution. Therefore, Plaintiffs-Appellees' expectation that they would receive the increased early-retirement benefits was not justifiable. Moreover, Plaintiffs-Appellees cannot assert estoppel when the passage of the December 7, 1994 resolution constituted a breach of fiduciary duty under § 501(a) of the LMRDA. *See Meyers v. Moody*, 693 F.2d 1196, 1208 (5th Cir. 1982), *cert. denied*, 464 U.S. 920, 104 S. Ct. 287, 78 L. Ed. 2d 264 (1983) ("The doctrine of estoppel is for the protection of innocent persons, and only innocent persons may invoke it.").

Nor may Plaintiffs-Appellees obtain the early-retirement benefits embodied in the December 7, 1994 resolution on the theory of ratification. On appeal, Plaintiffs-Appellees

strenuously assert that UPGWA ratified the early-retirement benefits by eliminating their positions and thereby retaining the cost savings associated with the early-retirement proposal. It is true, "Ratification occurs where the principal receives and retains the benefits of a transaction with full knowledge of all of material facts." *Davis v. Mut. Life Ins. Co. of New York*, 6 F.3d 367, 374 (6th Cir. 1993), *cert. denied*, 510 U.S. 1193, 114 S. Ct. 1298, 127 L. Ed. 2d 650 (1994). In this case, however, elimination of Plaintiffs-Appellees' positions was not dependent upon providing the increased early-retirement benefits. Although Plaintiffs-Appellees, as members of the IEB, may not have voted to eliminate their positions absent the generous early-retirement offer, the elimination of their offices could and did occur without their consent. UPGWA's constitution gave the IEB the authority to consolidate regions and eliminate directors' positions, which the IEB did through the January 24, 1995 resolution, and UPGWA's constitution gave the convention delegates the authority to eliminate the vice-president's position, which the delegates did at the International Convention in May 1995.

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the district court's judgment awarding Plaintiffs-Appellees the requested increased early-retirement benefits. Additionally, Plaintiffs-Appellees' motions to dismiss and motion for costs are **DENIED**.

DISSENT

MERRITT, Circuit Judge, dissenting. The plaintiffs entered into an agreement with the union to give up their jobs, salaries and expectations of future retirement benefits in return for yearly early retirement benefits of approximately $20,000 for Anderson, $30,000 for Squier and $40,000 for Scohy -- less than half their salaries. There is no showing of bad faith. They responded to the union's offer made by its President, originating with its accountants and blessed as to legality by its counsel. The district court was correct to conclude that the Union, through its retirement plan, as well as the actions of its president and the advice of its counsel, manifested authority in the Board to offer the early retirement contracts to the plaintiffs. The Retirement Plan specifically provides that the Union "acting through its ... Board" shall have the right to modify the plan. Moreover, the Union's constitution provides that the Board "shall decide all questions involving interpretation of the Constitution and By-Laws, between Conventions." Both the Union President and the Union's attorney, Gordon Gregory, assured the plaintiffs that there were no legal problems with the retirement plan.

The district court was also correct that the plaintiffs were reasonable in relying on such manifestations. Their beliefs that Board approval would bind the Union were reinforced by Board member Ronald Warfield, who at the time was a member of the pension committee; by Union President McConville, who presented the plan to them to begin with as a way to save the Union money and who assured them that the Board could bind the Union to such a plan; and by Gordon Gregory, who had been an attorney for the Union for 35 years, and whose opinion they sought and who repeatedly assured them that the Board action would be sufficient to make the plan binding. President McConville and Attorney

Gregory even testified that they thought the plaintiffs were reasonable in believing that Board approval could make the plan binding. It is true that the plaintiffs were made aware that there might be some legal challenge to the retirement plan, but that alone is not sufficient to make their reliance unreasonable in light of all the assurances they received, especially when the plan was not even their idea, but rather was presented to them as a way for the Union to save money. Indeed, the plaintiffs were praised for sacrificing their own jobs in order to save the Union money.

The Union argues that the plaintiffs cannot claim reasonable reliance on Attorney Gregory's advice when Gregory advised them otherwise on January 4th, recommending that the Board rescind the vote. But Gregory's advice on January 4th is irrelevant to the question of whether a contract had been created on December 7th. By that point the plaintiffs had already relied on the apparent authority of the President and the Board and the advice of counsel. Had the plaintiffs been the ones who sought to get out of the December 7th agreement while the Union sought to enforce it, the plaintiffs would likely have been bound.

The Union believes that the early retirement agreement violates Section 501 of the Labor Management Reporting and Disclosure Act (LMRDA), which makes it a breach of duty for a Union official to expend Union money in violation of the Union constitution, and which provides a cause of action for individual Union members when the Union's constitution is so violated. 29 U.S.C.A. § 501 (2003). But Section 501 does not provide that a Union may itself persuade otherwise innocent Union officers to sign a contract and then use that provision as a defense to the contract that the Union has entered into. As the majority notes, there is no precedent for allowing a Union to use Section 501 in this manner.

Moreover, even if a Union's officers had breached a Section 501 duty by entering into such a contract, that does not void the contract as illegal. Neither the language of the statute nor the case-law contemplates rendering the union contract void. The majority seems to admit this point, but downplays its significance. A contract should not be rendered void at the behest of the party that induced its formation at the expense of actors who lack culpability or any wrongful intent. If the Union members claim a breach of duty by the plaintiffs, that claim should be pursued in an action for damages in tort or restitution under the statute. Voiding the contract and leaving the plaintiffs out in the cold is too drastic a remedy and has no relation to any damages Union members may have suffered.

Furthermore, as I explained above, I do not believe the plaintiffs breached a duty to the Union members in the first place. Again, there was no showing of bad faith on their part, and the retirement plan was not their idea, but rather was the idea of the Union accountant, and was presented to them by the Union president as a way of saving the Union money. We should not now allow the Union to avoid the contract it drafted and asked them to sign, especially by means of a statutory provision that only provides a cause of action for third-party Union members. Doing so turns Section 501 into a one-sided escape route for Unions that Congress never intended.

For the aforementioned reasons, I respectfully **DISSENT.**

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 96-CV-70710-DT

[Filed January 4, 2000]

GARY ANDERSON, LOUIS SCOHY, and GEORGE SQUIER, Plaintiffs,	)
v.	)
INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA (UPGWA); INTERNATIONAL EXECUTIVE BOARD OF THE UPGWA; PENSION COMMITTEE OF THE UPGWA; and the RETIREMENT PLAN OF THE UPGWA, Defendants.	)

Hon. Gerald E. Rosen

OPINION AND ORDER SETTING FORTH THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

This ERISA/breach of contract action was tried before the Court without a jury in December 1999. The issue presented for trial was framed by the Sixth Circuit Court of Appeals in its July 31, 1998 decision reversing this Court's January 21, 1997 Opinion and Order granting the Defendants' Motion for Summary Judgment: Whether agency principles of apparent authority bind the UPGWA International Union to the terms of the early retirement resolution passed by the Union's International Executive Board on December 7, 1994. *See Anderson v. International Union,* 150 F.3d 590 (6th Cir. 1998). *See also,* August 31, 1999 Opinion and Order denying the parties' Post-Remand Cross-Motions for Summary Judgment.

During the course of the six-day bench trial, the Court heard the testimony of Plaintiffs Gary Anderson, Louis Scohy, and George Squier; UPGWA International President Eugene McConville; International Secretary-Treasurer and current UPGWA Pension Committee Chairman David Hickey; UPGWA International Executive Board Members Gary Hartlage, Kerry Lacey and Jack Webb; UPGWA Pension Committee Member Ronald Warfield; Union attorney Gordon Gregory; and Union accountant David Kaufman (by *de bene esse* video deposition). The Court also received into evidence numerous exhibits. Following trial, the parties engaged in a substantial amount of post-trial briefing which lasted through April 2000.

Having now had the opportunity to review the transcripts of the trial proceedings and the exhibits submitted at trial, and having further reviewed and considered the parties' post-trial briefs, the Court is now prepared to issue its ruling. Accordingly, pursuant to Fed. R. Civ. Pro. 52(a), the Court makes the following findings of fact and conclusions of law. To the extent that any findings of fact constitute conclusions of law, they are adopted as such. To the extent that any conclusions of law constitute findings of fact, they are so adopted.

II. FINDINGS OF FACT

1. Plaintiffs Gary Anderson, Louis Scohy and George Squier are former executive officers of the International Union, United Plant Guard Workers of America (UPGWA). Mr. Scohy is the former Vice-President of the UPGWA. Messrs. Anderson and Squier are former UPGWA Regional Directors.

2. Defendant UPGWA is an international labor organization which represents plant guards, security officers, fire protection and other employees performing protection and security activities for private and governmental employers. The International Union and its affiliated Local Unions are governed by a Constitution and By-Laws.

3. As provided in the UPGWA Constitution, the Union's highest tribunal is the International Convention which is convened every five years. [UPGWA 1990 Const., Art. VIII,

§ 1(a), Plaintiffs' Trial Ex. 9.][1] A Convention was held in May 1990. The next Convention was held in May 1995.

4. Between Conventions, the International Executive Board ("IEB") is the highest governing body of the UPGWA. [*Id.*, UPGWA Cong.,Art. VII, § 1(b).] Under the 1990 Constitution, the IEB consisted of the International President, the International Vice-President, the International Secretary-Treasurer, and the Regional Directors. [*Id.*, Art. IX § 3.] The president, vice-president, secretary-treasurer, and the regional directors are all full-time salaried officers. [*Id.*, Art. IX § 1, Art. X.]

5. As provided in the Constitution, between meetings of the International Executive Board, the administrative authority of the Union is vested in the International President, who "shall consult the other International Executive Officers on all matters of major importance and shall report his actions to the

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[1] Plaintiffs' Trial Ex. 9, as admitted at trial, consisted of only selected Articles excerpted from the 1990 UPGWA Constitution and By-Laws. However, witnesses who testified at trial referred to parts of the 1990 Constitution that are not included in Plaintiffs' Trial Ex. 9. Because all parties treated the omitted portions of the Constitution as if they were part of the record, Defendants have moved to supplement the record to substitute the entire 1990 Constitution and By-Laws for the excerpts submitted at Plaintiffs' Trial Ex. 9. The Court finds Defendants' motion well-taken and agrees that the full Constitution should be substituted for the excerpts submitted by Plaintiffs. (Moreover, the full Constitution was previously submitted in connection with summary judgment proceedings and, therefore, is a matter of record in this case.) Therefore, references herein to Plaintiffs' Trial Ex. 9 will be to the entire Constitution, appended to Defendants' March 20, 2000 Motion to Supplement Trial Record.

International Executive Board for approval or rejection." [*Id.*, UPGWA Const., Art. VII § l(c).] At all times relevant to this action, the UPGWA's International President was Eugene McConville.

6. Defendant Retirement Plan is a pension benefit plan established by the UPGWA under Article XI, § 2 of the Constitution and the Employee Retirement Security Act of 1974 ("ERISA"). *See* Plaintiffs' Ex. 9, Const. Art. XI, § 2; UPGWA Retirement Plan, Plaintiffs' Ex. 2.

7. The IEB isthe designated administrator of the UPGWA Retirement Plan. Const. Art. XI, § 2(d); UPGWA Retirement Plan, Art. IX§ 1]. However, the general administration of the Plan and the responsibility for carrying out the provisions of the Plan is delegated to a three-member Pension Committee. [Retirement Plan, Art. IX, § 1, Plaintiffs' Ex. 2.] The IEB designates the members of the Pension Committee. *Id.* At all times relevant to this action, Plaintiff Scohy was the Pension Committee Chairman.

8. In 1994, the UPGWA was experiencing financial difficulties. The Union's accountant, David Kaufman testified that he warned President McConville and members of the IEB that if the financial problems were not addressed, the Union would "be out of existence in a number of years."

9. In response to the concerns raised by Mr. Kaufman's projections, in late October 1994, President McConville came up with the idea of offering an early retirement package which would be tied to a reorganization of the union and include the merger of some regions of the Union, thereby eliminating some regional directors' positions, and eliminating the office of vice-president.

10. McConville testified that the general idea for an early retirement package came to him through his role as Union President. In that capacity, he had negotiated such a package for General Motors security guards.

11. While GM's plan offered years of service credits to people who otherwise were not the normal retirement age, McConville's proposal was to grant 10 years of credit which a person could use either toward years of service to get them to normal retirement age, or, if a person was already at normal retirement age (age 60), the 10-year credit could be used to increase the level of his pension benefits.[2]

12. McConville testified that he looked at the Union Constitution, specifically Article XI, Section 2(b), and checked with the Union's lawyer, Gordon Gregory, to determine whether there would be a problem with his contemplated early retirement offer under that Section. McConville said that Gregory's response was, "No," there was no problem. [Tr. p. 20.][3]

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[2] McConville's original proposal contemplated a 10-year age or service credit, *plus* a lump sum payment of $5,000 for each year of service. This "lump sum" bonus payment was subsequently abandoned on advice of counsel.

[3] Article XI, § 2 provides, in pertinent part as follows:

Section 2. The International Executive Board is empowered to formulate, maintain, and amend a Pension Retirement Plan to include, but not to exceed the following:

(a) All full-time elected officers and appointed International Union representatives who have at least five years of service shall be eligible under such Plan.

13. McConville then asked the Union accountant, David Kaufman, to look at the numbers and come up with figures for an early retirement plan. Kaufman complied with McConville's request.

14. Kaufman testified that McConville asked him to work up budgets to determine whether or not early retirement could be worked out for some of the members and whether it would be advantageous for the Union to do so. In connection with that work, Kaufman engaged a pension attorney, Harold Oseff, and a pension actuary.

15. McConville testified that under Kaufman's calculations, the Union was expected to save approximately two million dollars, net, from the elimination of four directors positions and the vice-president's position.

(b) The normal retirement age shall be Sixty (6) years. Disability and early retirement benefits shall be in accordance with the normal retirement age.

[Const., Art. XI, §2, Plaintiffs' Ex. 9.]

McConville acknowledged that the retirements he was contemplating were not "in accordance with normal retirement age" under Article XI, Section 2(b). But, he believed that if the early retirement proposal granted a one time 10-year credit (to bring the proposed retiree up to the required 60 years of age) and then was awarded reduced pension benefits pursuant to Section 2(b), his proposed plan would be in compliance. This belief was confirmed by Mr. Gregory's response that he saw no problem with his proposal, and McConville specifically testified that he relied upon Gregory's advice in this regard.

16. McConville believed that the reorganization/early retirement plan was in the best interests of the Union, and he believed that the costs savings warranted pursuing an early retirement plan.

17. Therefore, in November 1994, McConville proposed to Plaintiffs Anderson, Scohy and Squier, and another IEB member, Gary Hartlage, an early retirement plan tied to the merger of the regions headed by the proposed early retirees into other existing regions, and the elimination of the office of vice-president.

18. McConville discussed his restructuring/early retirement proposals with other board members and then called a special meeting of the International Executive Board for December 6-9, 1994 to consider the proposals.

19. Prior to the commencement of the formal Executive Board meeting, an "informal" meeting was held in President McConville's office on December 6th. Present at this informal meeting were President McConville, David Kaufman, the accountant, Gary Anderson, Louis Scohy, George Squier and Gary Hartlage.

20. David Kaufman testified that at this December 6th pre-Executive Board meeting, the issue of whether or not there might be any possible challenges to the proposed early retirements brought by anybody within the Union was brought up. According to Kaufman, the challenge issue was discussed "by most everybody in the room." [Kaufman Dep. p. 15.] As testified to by Executive Board member Gary Hartlage, who was also present at this December 6th pre-Executive Board meeting, there was really no substantive discussion of the challenge issue and no discussion at all as to whether or not such a challenge would be legally valid. [Tr. p. 413-415.]

According to Hartlage, President McConville "mentioned to us that there was a rumor" that Local 114 was going to challenge the early retirement proposal and the discussion consisted simply of "some comments made by people [like], '[W]ell, hell, here's 114 again. Everything we try to do over here, they got to come in and raise hell with us and why don't they support us once in a while.' Just comments like that." [Tr. p. 414.]

21. David Kaufman also testified there was a second informal meeting on either December 6th or 7th[4] at which two of the Plaintiffs, Messrs. Scohy and Squier, were present along with Mr. Kaufman and Union attorney Gordon Gregory.[5] Kaufman testified that at this second meeting the issue again came up as to whether or not there was a possibility of a challenge by the rank and file to the offering of early retirement. According to Kaufman, Mr. Gregory, who was present at this second meeting said that it was possible that there could be such a challenge. But Kaufman said that "that was pretty much the end of that [discussion] -- that there could be a challenge." *Id.* at 17. No specifics

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[4] Kaufman could not specifically testify when this second informal meeting took place. He was, however, certain that both of these informal meetings took place before the vote on the early retirement proposal was taken in the official Executive Board proceedings. As discussed, *infra,* that vote took place on December 7, 1994.

[5] On cross-examination, Mr. Kaufman said that he was not "absolutely sure" that Mr. Scohy was in the room with him and Mr. Gregory for this "second" pre-Executive Board meeting, but that he "believed" he was present. [Kaufman Dep. p. 28.]

concerning any challenge was ever discussed.[6] According to Kaufman, the only other thing mentioned at this meeting was that this challenge, if it was going to come, would probably be come from Local 114 and that Local's director, Jack Webb.

22. Kaufman attended the December 6-9, 1994 Executive Board meeting and at the meeting, made a presentation of the state of the UPGWA's financial affairs. Kaufman's schedules showed that the UPGWA faced a projected loss of $1 million for the fiscal year 1994-95. [*See* Plaintiffs' Ex. 11.] The IEB was also shown that by the elimination of the vice-president's position, $525,000 could be saved over the next five years. *Id.* Kaufman's schedules also showed that the elimination of three regional directors would save $1.70 million over five years, and with other cost cuts, a total of $4.5 million could be saved over five years. *Id.*

23. After Kaufman's presentation, on December 7, 1994, PresidentMcConville presented the early

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[6] Eugene McConville also testified that he never told any Board members prior to the Board meeting on what specific grounds the early retirement plan might be challenged. ("I don't know if I specifically said what the challenge could be. But I think I told them that there could be a problem, but that we were confident that we would be successful if there's a lawsuit." [Tr. p. 94-95.]) According to McConville, he felt no need to get into specifics at the December 6th pre-Board meeting because he believed all of the officers understood what a Section 501 challenge would consist of because the Board had just two years earlier faced such a challenge, and based upon conversations he had had with Union attorneys Gordon Gregory and Mark Heinen and Union accountant David Kaufman, he "felt comfortable that we were okay." *Id.*

retirement/reorganization proposal for discussion by the IEB. Union attorney Gordon Gregory was present when this topic was discussed.

24. During the December 7 discussion, IEB member Jack Webb asked whether the early retirement plan violated Article XI, Section 2 of the Union Constitution or Section 501 of the LMRDA. President McConville asked Union attorney Gordon Gregory to respond to Webb's questions. All witnesses who were in attendance at the Executive Board meeting when Gregory responded to Mr. Webb -- including Jack Webb himself, as well as Union President McConville, Plaintiffs Anderson, Scohy and Squier, and IEB members Gary Hartlage, Ronald Warfield, David Hickey and Kerry Lacey --testified that Gregory said that he did not believe there were any problems with the early retirement proposal under either Article XI Section 2 of the Constitution or Section 501.[7]

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[7] Defendants contend that prior to the vote on December 7th, Webb verbally threatened to sue the Union if the Board implemented the early retirement proposal. Defendants, however, mischaracterize Webb's testimony regarding what he said at the meeting. When directly asked whether he verbalized his threat to sue the Union, Webb testified that he said only that he "would seek outside counsel." [Tr. 736.] Plaintiffs do not dispute that they were present during Webb's discussion with Gordon Gregory concerning the legality of the proposal but they all testified that they did not pay much attention to what Webb had to say. Plaintiff Squier testified that he viewed Webb as "just complaining again" when he questioned the legality of the proposal. [Tr. pp 458-59.] Plaintiff Scohy testified that he viewed Webb's comments as nothing more than just another instance of Local 114 [Jack Webb's local] voicing its opposition as it always had to whatever the Board was doing. [Tr. 570-73.] Plaintiff Anderson testified that he was in the room only for the tail end of the discussion but that he was not concerned about Webb's questioning the legality because he believed that "The

Gregory himself admitted that he told the IEB that he did not believe there were any problems with the plan.

26. Numerous witnesses, including UPGWA President McConville, testified to their belief that it was reasonable for members of the Union's International Executive Board to rely upon the opinions and advice of long-time Union attorney Gregory. Mr. Gregory himself testified that he expected the members of the Board to rely upon any legal opinion he gave them. [Tr. p. 821.]

27. Contrary to Gregory's assurances to the Executive Board members on December 7, 1994 that he saw no problems with the early retirement plan, two days before the Board meeting, on December 5, 1994, Mr. Gregory had written a five-page, single-spaced letter to Union President McConville "in anticipation of questions by Board members" concerning the early retirement proposal in which Gregory noted several potential problems with the proposal. [*See* Plaintiffs' Ex. 14.] The letter stated in pertinent part as follows:

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board would not have allowed that vote to go on if there was a severe, a serious question concerning something constitutional that we were going to address." [Tr. 348-349.] More importantly, all three Plaintiffs testified that Webb's questions did not raise any red flags in their minds because they had been assured by President McConville, the accountants, and the Union attorney, Gordon Gregory, both during the Board meeting and in private, that everything was all right. [*See e.g.*, Squier testimony at Tr. pp. 458-59.]

Dear Gene:

On Monday, November 28, 1994, I received from Dave Kaufman a proposed Resolution for the International Executive Board to adopt an early retirement plan for certain eligible officers and board members ....

In anticipation of questions by Board members, I asked Mark Heinen to review the proposed early retirement plan for compliance with ADEA, OWBPA, ERISA and IRC, You have received separate legal opinions on these matters ....

On the basis of the early retirement plan presented to us, and information supplied by Dave Kaufman, it is concluded that it complies with ADEA, OWBPA, ERISA, and IRC.

Although not requested to do so, I have considered the early retirement window for compliance with the International Constitution and By-Paws, and with the Labor-Management Reporting and Disclosure Act. In anticipation of questions by Board members, I believe it essential to have a written analysis.

CONSTITUTIONAL CONSIDERATIONS

Article XI, Section 2. of the International Constitution incorporates by reference a "Pension Retirement Plan."

* * *

There is no express language limiting the Board's initiative and authority regarding early retirement eligibility and benefits.

An argument could be made, however, that the specific references to age 60 and five years of service preclude any plan amendment to achieve early retirement without reduction of the retirement benefit.. Note that Article XI, Section 2, (b) states] that "... early retirement benefits shall be in accordance with the normal retirement age." Thus a challenge to the proposed retirement window would claim that the grant of normal retirement benefits to anyone prior to age 60 would "exceed" the benefits outlined in the Constitution. It is, of course, a question of interpretation ....

LEGAL CONSIDERATIONS

Section 501(a) of the LMRDA provides as follows:

> "Sec. 501. (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties from holding or

acquiring any pecuniary or personal interest which conflicts with the interests of such organization . . . .[emphasis supplied by Gregory.]

I predict and anticipate that a member or members may challenge the early retirement window as constituting a violation of Section 501(a) by each officer voting for it and/or receiving its benefits. Albeit the purpose of the plan is to reduce staff and costs, it will be a fact question for a judge or jury as to whether the plan was prudent at the time of its adoption by the International Executive Board. Opponents of the plan may allege as follows:

First. . . [T]he delegates to the last Convention established a procedure to enhance and protect the pension eligibility of those full-time officers who could not achieve the five year service requirement through no fault of their own. It may be claimed that any grant beyond that is contrary to the Union's Constitution unless clearly justified by "special problems and functions" of the organization.

Second, the Convention may eliminate or rearrange Regions,... reduce salaries and benefits,... or... reduce programs or services. It may be claimed that the early retirements were designed and intended to insulate certain Board members from Convention action. Moreover, it could be argued that some officers may not run for re-election, some may not get nominated, and some may not get re-elected.

* * *

Fourth, it might be alleged that... if staff cuts were necessary for the welfare of the Union, they should have taken place without promise of reward.

Fifth, it may be asserted that the early retirement...constitutes self-dealing because those benefitting from it will be those voting for it. Since the early retirants are eligible only if their full-time positions are eliminated, they have a compelling inducement to vote to eliminate their own job for three (3) months (i.e., February 15 - May 15, 1995).

The opponents of the plan may also claim that the early out jobs may not be eliminated as full-time positions. For example, the Convention could vote to maintain the present staffing to be financed by increased dues, change in the dues split, reduced salaries and benefits, other means, and even maintain the status quo.

And finally, it could be claimed that the plan is politically motivated because the position of International Secretary-Treasurer will not be eliminated or reduced to part-time. Any change in that office requires action by the Convention.

Legal research failed to disclose a case or administrative ruling directly in point .... Needless to say, each case is decided on its facts and merits. It would be a question of fact whether the early retirement window was in effect "solely for the benefit of the organization and its members" or whether it should have been deferred and submitted to the

Convention. No matter how noble the motive, there can still be a violation of Section 501(a) of the LMRDA.

Prospective early retirees will undoubtedly ask if the International Union can guarantee the early retirement benefits in the event of a challenge, and indemnify them for costs and attorneys fees. The answer is no if a violation of Section 501(a) is found. Individual union officers can only be reimbursed after a finding that 501(a) was not violated. Moreover, the early retiree would be directly involved by virtue of his vote to eliminate his position and to approve the early retirement window.

I believe that there will be an administrative and/or judicial challenge to the early retirement window if adopted. Predictably, it will raise the allegations set forth above.... Obviously, the ultimate nature and outcome of such a challenge, if any, cannot be predicted with certainty.

[Plaintiffs' Ex. 14 (emphasis added).]

28. President McConville admitted that he had received Gregory's December 5th letter prior to the Executive Board meeting but he never mentioned it during the meeting when the Section 501 and Constitutional questions were raised by IEB member Webb or at any other time during the meeting. Nor did attorney Gregory ever mention it during the meeting. Gregory, in fact, testified that he did not think he even had a copy of the letter with him at the meeting.

29. Although Mr. Gregory admitted never having mentioned his December 5th letter during the December 7th

Board meeting and admitted having assured the Board members that he saw no problems with the early retirement proposals, Gregory testified that in a "side bar" private meeting requested by Plaintiffs on December 7th, he told Plaintiffs Anderson, Scohy and Squier about the letter and its contents. He said, however, that none of the Plaintiffs asked to see the letter.

30. Plaintiffs Anderson, Scohy and Squier, however, all testified that Gregory never said anything about the letter in that "side bar" meeting and they all testified that Gregory assured them that there were no legal problems with the early retirement plan. Plaintiffs Anderson and Squier also testified that they asked Gregory in the course of this "side bar" meeting whether they could lawfully vote on the proposal, and that Gregory assured them they could lawfully do so.[8] The Court fully credits the Plaintiffs' testimony concerning this "side bar" meeting with Mr. Gregory.

31. The Court finds that Mr. Gregory's testimony that he told Plaintiffs Anderson, Scohy and Squier about his December 5,1994 letter to President McConville and its contents setting forth numerous problems with the plan under the UPGWA Constitution and Section 501 of the LMRDA is simply not credible. The Court is particularly persuaded that Gregory's testimony should not be credited because, by all accounts, on the same day, Gregory told the full Board that there were "no problems" with the plan. The Court finds it incredible that Gregory would tell the full Board one thing,

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[8] Gregory was unable to testify with certainty whether any of the Plaintiffs asked whether they, as expected beneficiaries, could lawfully vote on the plan. However, Gregory did testify that if they had asked him that question, he would have told them that they could vote. [Tr. 816.]

then go into a "side bar" private meeting with three of the Board members and tell them there were numerous problems with the plan (or vice versa, tell three Board members there were problems and then go into a full Board meeting with the same three Board members present and say there were no problems).[9]

32. Following the accountant's presentation on the financial underpinnings of the early retirement proposal and the Board members' questions concerning the legality of the plan and Mr. Gregory's responses thereto, by a vote of eight in favor and three opposed,[10] the IEB passed a resolution which provided as follows:

> WHEREAS, the International Union faces a financial exigency which requires a reduction of staff, a rearrangement of regions, and a reassignment of duties, and

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[9] The Court is further persuaded that Gregory's testimony should not be credited since he testified that none of the Plaintiffs asked to see a copy of the December 5th letter. Given the fact that Plaintiffs Scohy and Squier testified that they had asked for any legal opinions concerning the early retirement proposal that had been written prior to December 5th and were provided with copies of those opinions (which concerned the legality of the early retirement plan under ERISA, age discrimination [ADEA] and the Internal Revenue Code [IRC]), the Court finds that if Mr. Gregory told Plaintiffs about the December 5th letter and its contents concerning the potential illegality of the plan under Section 501 of the LMRDA and the Union Constitution, it would be incredible for Plaintiffs not to have asked to see a copy of the letter.

[10] Jack Webb, Ronald Warfield and Denise Sylvestre voted against the resolution.

WHEREAS, the circumstances require immediate action to stabilize the Union's financial position, and to establish a reorganized staff, internal administrative structure, and long range budget plan prior to the Constitutional Convention, and

WHEREAS, the Board has considered numerous alternatives, and has concluded that it is fair, reasonable and appropriate to reduce staff and reorganize regions through an early retirement program,

NOW, THEREFORE, it is hereby resolved that the International Union will offer an early retirement window to all full-time Union officers and directors, who meet the following eligibility requirements:

1. Must be 50 years of age or over as of December 31, 1994.

2. Retirement must cause one full-time position to be eliminated.

3. Retirement must be taken on February 15, 1995.

4. Acceptance of this window must be made by December 8, 1994.

All full-time officers and directors meeting the eligibility requirements, will be offered the following early retirement package:

> 1. An officer or director will receive ten (10) years allocated to age and/or service, at their discretion for pension benefit computation.
>
> 2. An officer or director shall be entitled to all benefits as stated in Article XI, Sections 1 and 2(e) of the Constitution and By-Laws of the International Union, United Plant Guard Workers of America (UPGWA), dated May 19, 1990.
>
> IT IS FURTHER RESOLVED that the Officers Retirement Plan be amended to incorporate this early retirement window, and the International President and International Secretary-Treasurer are directed to take such action as is necessary and appropriate to implement this Resolution.

[Plaintiffs' Ex. 1; 10 at p. 52.]

33. It is undisputed that but for the Board's adoption of the early retirement resolution, none of the Plaintiffs would have been eligible for early retirement under the UPGWA Retirement Plan. Under the terms of the UPGWA Plan, a covered employee is entitled to full retirement only if he is at least 60 years of age, or a reduced retirement benefit if he is under age 60 but over age 55 and has completed at least five years of service. [*See* Plaintiffs' Ex. 2.] No provision is made for retirement under age 55. Neither Plaintiff Anderson nor Plaintiff Scohy was 55 years old,[11] and neither had completed the required five years of service. As for Plaintiff Squier,

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[11] Gary Anderson did not turn 55 until August 22, 1996. Louis Scohy did not turn 55 until September 17, 1996.

although he was 59 years of age, he like Anderson and Scohy, had not yet completed five years of service.

34. Plaintiffs Anderson, Scohy and Squier decided to take advantage of the early retirement window provided in the December 7, 1994 Resolution, and on December 8, 1994, each accepted the early retirement offer in writing:

> I hereby accept the offer set forth in the International Executive Board Resolution of December 7, 1994, offering an early retirement window to all eligible full-time officers and directors.
>
> My date of retirement shall be February 15, 1995.
>
> I understand I will receive the following pension benefits commencing upon my retirement:
>
> Monthly pension of $1,682.95.[12]
>
> /s/

[*See* Plaintiffs' Ex. 3, 4 and 5]

35. On December 9, 1994, the IEB passed another resolution, this one consolidating, rearranging, and dissolving certain regions. Regions 2 and 4, of which Plaintiffs Squier and Anderson had been the directors, were to be dissolved effective February 15, 1995, i.e., the date on which Plaintiffs

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[12] This sum is the pension amount set forth in Gary Anderson's acceptance. [*See* Plaintiffs' Ex. 5.] Louis Scohy's acceptance stated that his monthly pension would be $3,437.87. [Plaintiffs' Ex. 3] George Squier's acceptance stated that his monthly pension would be $2,478.82. [Plaintiffs' Ex. 4.]

retirements under the December 7 resolution were to become effective. No action was taken at the IEB December 6-9 meeting to eliminate the vice-president's position.[13]

36. Not all members of the executive board, however, were in favor of the restructuring and early retirements. On December 22, 1994, IEB member Jack Webb, who was another regional director, wrote a letter to President McConville formally informing the Union of his intent to bring suit against the UPGWA and its officers on the grounds that the early retirements violated the Union Constitution and § 50 l(a) of the Labor Management Reporting and Disclosure Act. Webb's letter stated in pertinent part, as follows:

> Dear Brother McConville,
>
> I am deeply troubled by the International Executive Board's resolution at its December 7, 1994 meeting to offer early retirement packages to officers and regional directors, and I am aware that many other members of this Union share my concerns. It appears to me that you and other officers of the Board have intentionally violated the UPGWA constitution and your fiduciary duty as officers by adopting the resolution.

---

[13] It is undisputed that to eliminate the vice-president's position, a constitutional amendment was required, and hence, such action had to await a vote of the membership at the 1995 International Convention.

Our constitution provides:

> "The Intemational Executive Board is empowered to formulate, maintain, and amend a Pension Retirement Plan... not to exceed the following:
>
> "The normal retirement age shall be sixty (60) years. [D]isability and early retirement benefits shall be in accordance with the normal retirement age." Art. XI, Sec 2(b)

* * *

You surely knew that modifications of the Retirement Plan require amendments to the Plan, and that the expansion of early retirement benefits contained in the December 7th resolution requires an amendment to the Constitution.... Even though only a few months' wait would have been required to present the proposal to the Convention, in a lawful manner, you chose to proceed by way of Executive Board resolution because you know as well as I do that this proposal does not stand a chance of being approved by the Convention.

You have not asked the Board to adopt the required amendment to the Retirement Plan, probably because it would have been so painfully clear to the entire Board, if you had done so, that the required Plan amendment would violate the Constitution's prohibition against any amendments to the Plan that create benefits exceeding the explicit constitutional limit on early retirement benefits.

* * *

By this letter, I am asking that you provide an explanation of why the December 7th Board resolution does not violate our Constitution....

We intend to sue to enjoin the implementation of the December 7th resolution before its effective date, if you do not provide a satisfactory response to this letter. I would much prefer to resolve this problem without a lawsuit. We could resolve this crisis by a Board decision to reconsider its December 7th resolution and to withdraw it.

Fraternally,

/s/
Jack H. Webb, Region One Director

c: Scohy, Anderson, Squier, Harvey

[*See* Plaintiffs' Ex. 20]

37. The real threat of legal action as vowed by Webb was confirmed by Union attorney Gordon Gregory in an opinion letter and legal memorandum sent to President McConville on January 4, 1995. [*See* Plaintiffs' Ex. 21] Gregory opined, in pertinent part, as follows:

Dear Brother McConville:

As a consequence of Jack Webb's letter to you dated December 22, 1994, and the threat of a possible lawsuit against you and others claiming a breach of fiduciary duty, you have directed this firm to prepare a legal analysis and opinion.

As you know, Section 501 of the LMRDA requires in part that union officers manage and expend union funds in accordance with its constitution and by laws and any resolution of its governing body adopted thereunder. Thus the December 7 IEB resolution is not valid per se. It must be determined whether it was and is in accordance with the International Constitution.

Regretfully, Article XI, Section 2(b) of the International Constitution is vague, and... subject to different interpretations of varying credibility. Albeit the IEB has authority to interpret the Constitution, a court will strictly construe the provision at issue where union officers are alleged to have reached an interpretation which violates the fiduciary duty. ...[T]he most plausible interpretation of Section 2(b) is that early retirement benefits must be reduced from normal retirement benefits.

I have no personal recollection as to how or when Section 2(b) was added to the Constitution....

In summary on this point, there is a strong possibility that a court would find that the proposed early retirement plan violates Article XI, Section 2(b). My conclusion is buttressed by other facts and circumstances to be discussed below.

For reasons I have previously stated, it is my opinion that the U.S. District Judge could find a violation of § 501(a) of the LMRDA irrespective of any interpretation or indeed the existence of Article XI, Seciton 2(b). The burden of showing that the early

retirements were in the interest of and for the benefit of the Union would be on the officers and the IEB.

* * *

In my opinion, a court will not be persuaded that the early retirements save money over a five (5) year period because the job expectancy of each early retirement does not extend past May 16, 1995. A court will look primarily at the cost savings between the early retirement and the date of the Convention. Any savings appears to be de minimis because the retirees are not off the payroll any substantial period prior to the Convention, and the cost of such early retirements will in due course increase contributions to the pension plan.

Judicial review of the early retirement plan will also be influenced by the proximity of the International Convention. Since the Convention is only four months away, the court will question the need for action in December, 1994, when the early retirees will in fact continue on the payroll nearly to May 16, 1995. The court will reason that Article XI, Section2(b) is ambiguous, that the early retirement is generous considering the job expectancy, that there is no significant immediate saving of cost, and that such decisions should be made by the membership through their elected convention delegates.

I cannot recommend that we argue to the court that the Convention is unable to deal effectively with the problem of union finances and restructuring. Such an argument is autocratic and antithetical to the International Constitution and the LMRDA. Again,

because of the short period of time before the Convention, a court would not feel that it is substituting its judgment for that of the IEB but merely deferring and remanding a critical decision to the Union's highest authority.

On the basis of the foregoing, Mark [Heinen]'s research, and my earlier comments, it is my considered opinion that the court would issue an injunction maintaining the status quo ante, and directing that the early retirement plan be abandoned or submitted to the Convention for approval. The court is likely to award costs and attorney fees to the plaintiff(s).

Sincerely,

/s/
Gordon A. Gregory

[Plaintiffs' Ex. 21.]

38. As a result of the threatened lawsuit and Gordon Gregory' s opinion letter, on January 5, 1995, McConville wrote to to the International Executive Board suggesting that the restructuring/early retirement proposals be temporarily withdrawn and placed before the full membership at the International Convention in May 1995 for a vote on a Referendum Ballot. McConville wrote:

Dear Brothers and Sister:

REFERENDUM

In consideration of the threat of expensive, time-consuming, and divisive litigation to attack and set aside the Board's Resolutions of December 7 and 9, 1994, providing financial savings through accepted early retirement incentives, and necessary realignment of Regions to reduce the number of full-time officers, should the Board defer implementation of its Resolution, maintain the status quo, and submit the matter to the forthcoming International Convention?

YES_____ NO_____

Please signify your approval or disapproval as indicated above, and return to this office as soon as possible.

Sincerely & Fraternally,
/s/
Eugene P. McConville
International President

PRINT NAME:_____
(SIGNATURE):_____
DATE:_____

39. The Board voted to defer implementation of the December Resolutions and submit the matter to the Convention in May 1995. Plaintiffs continued in their officer positions until the May 1995 Convention.

40. At the Convention, Squire ran for re-election as regional director, but lost. Anderson did not seek re-election. The membership also voted at the Convention to amend the union's constitution to eliminate the office of vice-president which had been held by Scohy. However, the membership rejected implementation of the proposed early retirement plan.[14]

41. Plaintiffs thereafter instituted this action.

III. CONCLUSIONS OF LAW

1. When, as in this action, a case has been remanded by an appellate court, the trial court is bound to "proceed in accordance with the mandate and law of the case as established by the appellate court." *Hanover Ins. Co. v. American Engineering Co.*, 105 F.3d 306, 312 (6th Cir. 1997), quoting *Petition of U.S. Steel Corp.*, 479 F.2d 489, 493 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973). Therefore, the starting point for this Court is the Sixth Circuit's framing of the issues in its July 31, 1998 opinion.

2. As indicated, the Sixth Circuit found that the relevant issue in this case is whether agency principles bind the union to the terms of the early retirement resolution passed by the IEB on December 7, 1994. *See Anderson v. International Union, supra,* 150 F.3d at 592. Because this agency issue was never addressed nor even raised by any of the parties or the Court, the appellate court remanded the matter for further

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[14] In September 1995, Plaintiff Squier filed an application for retirement benefits under the UPGWA Retirement Plan and was granted his normal retirement benefits thereunder. Neither Anderson nor Scohy ever filed a formal application for retirement benefits under the Plan.

findings. *Id.* at 593, 594. The Court of Appeals further set forth the applicable law and the facts that this Court should consider in addressing the agency issue, explaining:

> The relevant issue,..., as we see it, an issue not addressed by the parties or the court below, is whether agency principles of apparent authority bind the union to the terms of the resolution passed December 7 modifying the plan to grant early retirement benefits to plaintiffs.
>
> In making this determination, we are guided by the law of agency as developed and interpreted as a matter of federal common law. *See Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 110, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). Under the federal common law of agency, apparent authority arises in those situations where the principal causes persons with whom the agent deals reasonably to believe that the agent has authority. *See Taylor v. Peoples Natural Gas Co.,* 49 F.3d 982 (3d Cir. 1995) (supervisor of employee benefits was acting at least with apparent authority as agent of ERISA plan to council [sic] retiree on early retirement program).
>
> It is well-settled that apparent authority (1) results from a manifestation by a person that another is his agent, regardless of whether an actual agency relationship has been formed and (2) exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized. *See generally,* Restatement (Second) of Agency §§ 8, 27 & cmts. thereto. Specifically, a party may rely upon the apparent authority of union representatives to enter into an agreement where there is basis for such

reliance. *National Labor Relations Bd. v. Truckdrivers, Chauffeurs and Helpers, Local Union No. 100,* 532 F.2d 569, 570-71 (6th Cir. 1976). Because the record before us on this issue is limited, we remand for the district court to make further factual findings on whether principles of apparent authority can bind the union to the December 7, 1994 resolution....

Specifically, the district court should determine if union president McConville, as president of the union and a member of the Executive Board, and the Executive Board, were acting within their apparent or actual authority as representatives of the union's retirement plan and whether plaintiffs reasonably relied upon this authority to enter into the agreement for early retirement benefits. Whether plaintiffs' reliance was reasonable may turn, in part, on whether they were aware of the possible legal challenges to the December 7, 1994 resolution before they accepted the early retirement offer.

We note that defendants contend that the failure of the full membership to ratify the resolution rendered it void because ratification is required by the union constitution and bylaws. Apparent authority, however, may attach even when the agent's acts are unauthorized. Restatement (Second) § 159 & comt. f. *See, e.g., Richards v. General Motors Corp.,* 991 F.3d 1227, 1232 (6th Cir. 1993) (employer contractually liable for ERISA benefits based on apparent authority of plan administrator). This circuit and others have repeatedly held that even in the presence of a ratification requirement, a third party may rely upon the apparent authority of the union

representatives to enter into an agreement where there is a reasonable basis for such reliance. *See, e.g., Central States Southeast and Southwest Areas Pension Fund v. Kraflco, Inc.*, 799 F.2d 1098, 1111-12 (6th Cir. 1986)(side letter to collective bargaining agreement regarding pension payments was valid and binding on union even without required ratification); *accord Kozera v. Westchester-Fairfield Chapter of Nat'l Elec. Contractors Ass'n*, 909 F.2d 48, 54 (2d Cir. 1990) (agreement not ratified by union membership as required was nevertheless binding on union under principle of apparent authority); *Moreau v. James River-Otis, Inc.*, 767 F.2d 6, 9-10 (lst Cir. 1985) (provision in union constitution that local union cannot bind international union without written consent did not prohibit finding of apparent authority).

While the case law generally refers to the union's relationship with a third party outside the union, usually an employer, the apparent authority principles are relevant to the situation here in defining the relationship between the union as a whole and the plaintiffs. The record amply demonstrates that the Executive Board and plaintiffs reached an agreement on December 8, 1994. On remand, the district court should determine whether plaintiffs knew or should have known about the ratification requirement and, if they did, what bearing that knowledge had on the reasonableness of any reliance plaintiffs placed on the authority of the union president and the Executive Board to enter into the agreement for early retirement benefits.

150 F.3d at 592-93 (emphasis added).[15]

Guided by the foregoing, the Court makes the following determinations regarding the apparent or actual authority of Union President McConville and the Executive Board and the reasonableness of the reliance of the Plaintiffs thereon.

A. MANIFESTATION OF APPARENT AUTHORITY OF THE EXECUTIVE BOARD

3. Under the federal common law of agency, apparent authority arises in those situations where the principal (here, the UPGWA) causes persons with whom the agent (the IEB) deals to reasonably believe that the agent has authority to bind the principal. *Anderson v. International Union, supra,* citing

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[15] Notwithstanding the Sixth Circuit's clear directive remanding this case for findings on the apparent authority issue, Defendants argue that the common law agency doctrine of apparent authority cannot be imported into a cause of action under ERISA to compel the granting of pension plan benefits. To accept Defendants argument, however, the Court would have to ignore, not only the Sixth Circuit's clear directive in this case, but also numerous other Circuit decisions in which the courts have expressly held that common law agency principles -- including the doctrine of apparent authority -- are matters of federal common law and, as such, are specifically incorporated into ERISA law. *See, e.g., Richards v General Motors Corp.*, 991 F.2d 1227, 1232 (6th Cir. 1993) (employer contractually liable for ERISA benefits based on apparent authority of plan administrator); *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 988-89 (3rd Cir. 1995) (employee benefits supervisor found to have acted with apparent authority as agent of ERISA plan such that employer/plan administrator would be held liable for misrepresentations of the supervisor concerning early retirement plan) *See also, Bowerman v WalMart Stores Inc.*, 226 F.3d 575 (7th Cir. 2000).

Taylor v. Peoples Natural Gas Co., 49 F.3d 982 (3rd Cir. 1995).

4. Apparent authority (1) results from a manifestation by a person that another is his agent, regardless of whether an actual agency relationship has been formed and (2) exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is so authorized. *Anderson, supra.* Apparent authority may attach even when the agent's acts are actually unauthorized, *Id.* Thus, in this case, notwithstanding the fact that the full union membership failed to ratify the early retirement resolution, the union may nonetheless by obligated to honor the Plaintiffs' early retirement contracts if President McConville and the IEB had the apparent authority to enter into the agreements for early retirement benefits, and the Plaintiffs reasonably relied upon that authority in entering into the agreements.

5. The Court turns to the first requirement for establishing apparent authority, i.e., whether there has been some manifestation by the union that President McConville and the IEB had authority to enter into the agreements with Plaintiffs.

6. Apparent authority of an agent to do an act can be created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him. *Richards v. General Motors Corp.*, 991 F.2d 1227, 1232 (6th Cir. 1993) quoting Restatement (Second) of Agency, § 27. Further, apparent authority can be created simply by appointing a person to a position which carries with it generally recognized duties; to those who know of the appointment there is apparent authority to do the things ordinarily entrusted to one occupying such a position. *Id.*

7. Applying the foregoing principles, the Court finds that apparent authority is manifested in the UPGWA Retirement Plan and the assurances of union president McConville and union attorney Gordon Gregory that the early retirement contracts were valid and enforceable.

8. Article XI of the UPGWA Retirement Plan specifically and unequivocally provides:

> Section 1. Right to Amend
>
> The Union, **acting through its International Executive Board**, reserves and **shall have the right at any time and from time to time** to terminate, **modify or amend in whole or in part any and all provisions of the Plan**, provided however that... no modification or amendment of any of the provisions of the Plan or its operation may be made if, by reason of such modification or amendment, any Covered Employee, Vested Employee, Retired Employee or beneficiary would be deprived without his consent of the benefits that accrued with respect to him to which, apart from such modification or amendment, he would be entitled to under the Plan.

[Plaintiffs' Ex. 2, p. 45 (emphasis added)]

The UPGWA Retirement Plan in this case places no pertinent limitation on the IEB's authority to modify or amend, at any time, in whole or in part, the plan provisions. It is, therefore, a clear manifestation of the IEB's apparent authority to modify the UPGWA plan to allow for the special early retirement of the Plaintiffs.

9. Additionally, Article XII, Section 5 of the UPGWA Constitution provides that the IEB "shall decide all questions involving interpretation of this Constitution and By-Laws, between Conventions," and also in Article XII Section 1, which states: "The International Executive Board shall... be the highest authority of the International Union between Conventions...." [Plaintiffs' Ex. 9.] Plaintiffs testified that Union President McConville, presiding over the IEB, specifically told Plaintiffs prior to their acceptance of the early retirement offer that there were no legal problems with the early retirement proposal and that he had had the proposal checked by both the accountants and the Union attorneys. This evidence of assurances by the presiding officer of the IEB that the early retirement proposal was legal constitute further manifestation of the apparent authority of McConville and the IEB to enter into early retirement contracts with Plaintiffs.

10. The union constitution further authorizes the union president to hire legal counsel. [*See* Article XIII, Section 6 of the UPGWA Constitution, Plaintiffs' Ex. 9.] President McConville retained Gordon Gregory. All IEB witnesses testified that Mr. Gregory also assured them that there were no problems with the early retirement proposal proposed by the IEB. Plaintiffs further testified that Gregory also assured them that there were no legal problems with the proposal in a private "side bar" meeting prior to the vote on the early retirement/union restructuring resolution.

11. In sum, the Court finds in the totality of the foregoing evidence, that there is sufficient indicia that McConville and the IEB were authorized to enter into early retirement contracts with the Plaintiffs to satisfy the first prong of the test for apparent authority.

B. PLAINTIFFS REASONABLY RELIED UPON THE AUTHORITY OF UNION PRESIDENT McCONVILLE AND THE IEB IN ENTERING INTO THE EARLY RETIREMENT AGREEMENTS ON DECEMBER 8, 1994.

12. As noted above, in order to bind the union, in addition to showing sufficient indicia of the Union's manifestation that McConville and the IEB had authority to enter into the early retirement agreements with Plaintiffs, Plaintiffs must establish that they *reasonably* relied upon the authority of union president McConville and the Executive Board in entering into those agreements. *See Anderson v. International Union, supra.*

13. All three Plaintiffs testified that they believed that the IEB had the authority to offer them early retirement pursuant to the December 7, 1994 Resolution, and that nothing further needed to be done to make the contracts binding. Plaintiffs' belief was confirmed by IEB Board Member Ronald Warfield who at the time was a member of the UPGWA Pension Committee. Mr. Warfield testified that nothing more than the IEB's resolution was required to amend the Retirement Plan, and that to implement the amendment, all that he had to do as a Pension Committee member was to send the actuarial company a copy of the resolution and instruct the actuaries to calculate the Plaintiffs' pensions. [Tr. p. 263. *See also,* testimony of Plaintiff Scohy who was, at the time, Chairman of the Pension Committee, at Tr. p. 608.]

14. Further, all three Plaintiffs testified that they relied upon the assurances of Union attorney Gordon Gregory that there were no legal, problems with the early retirement proposals.

15. UPGWA President McConville and Union attorney Gordon Gregory himself testified that it was reasonable for IEB members, including Plaintiffs, to rely upon Gregory's legal opinions and assurances.

16. Given the fact that Mr. Gregory had been the Union's and IEB's legal counsel for more than 35 years and given the fact that Plaintiffs testified that they had known Mr. Gregory in that capacity for more than 35 years, the Court finds that it was reasonable for Plaintiffs to rely upon Mr. Gregory's assurances that there were no legal problems with the early retirement plan.[16]

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[16] As noted at the first pre-appeal summary judgment hearing on this matter on November 14, 1996, the Court is troubled by a potential conflict of interest problem with Plaintiffs voting for an amendment of a retirement plan benefitting themselves. Plaintiffs, however, all testified that they were assured by Gordon Gregory that they could legally vote on the early retirement plan notwithstanding that they would also benefit from the plan amendment. Although Mr. Gregory could not specifically recall having been asked by any of the Plaintiffs whether they could vote on the plan, he testified that if he had been asked, he would have told Plaintiffs that they could legally vote for the early retirement proposal even though they would personally benefit from it. Further, evidence was presented at trial showing that voting by IEB members with a personal interest in the outcome of a vote -- including at least one instance involving a modification of the UPGWA retirement plan -- was standard practice. More importantly, all of these issues were matters of record when the case was on appeal before the Sixth Circuit. If, as Defendants argue, the "conflict of interest" issue rendered Plaintiffs' December 8, 1994 agreements unenforceable, the Sixth Circuit would not have remanded the case for findings on the issue of the apparent authority of McConville and the IEB to bind the Union to the December 8, 1994 agreements.

17. Thus, the Court finds that notwithstanding that Plaintiffs may have been heard it discussed prior to December 7, 1994 that Jack Webb and Local 114 might "challenge" the early retirement proposal, given that these pre-December 7 Board meeting discussions did not get into the substance of such a potential challenge nor was there ever any discussion of the legal validity of such a challenge, it was reasonable for Plaintiffs to rely upon the repeated assurances of Gordon Gregory on December 7th, and upon the assurances of President McConville that the plan had been checked out by the Union's accountants and attorneys that there were no legal problems with the plan.

18. It having been reasonable for Plaintiffs to rely upon the assurances of their Union President and the Union's attorney that there were no legal impediments to the early retirement plan, the Court finds that Plaintiffs reasonably relied upon the apparent authority of the IEB to adopt the Resolution on December 7, 1994 providing for an early retirement plan in accepting early retirement pursuant to that Resolution on December 8, 1994.

19. Therefore, notwithstanding that implementation of the early retirement plan was rejected at the May 1995 Union Convention, by application of agency principles of apparent authority, the Court finds that the Union is bound by the terms of the resolution passed December 7, 1994 modifying the UPGWA Retirement Plan to grant early retirement benefits to Plaintiffs.

20. Plaintiff Scohy began taking normal retirement benefits on September 1, 1996 in the amount of $1,943.81 per month; Plaintiff Squier began taking normal retirement benefits on November 1, 1995 in the amount of $831 per

month; Plaintiff Anderson has not received any retirement benefits. *See* Plaintiffs' Ex. 49.

21. The parties stipulated at trial to the calculation of benefits and arrearages to which Plaintiffs would be entitled should they prevail as provided in Plaintiffs' Ex. 49.

22. As stipulated by the parties, Plaintiff Anderson's current arrearage is $92,562.25 plus $1,682.95 for each month from January 2000 through the date of entry of judgment. *See* Plaintiffs' Ex. 5 and 49.

23. As stipulated by the parties, Plaintiff Scohy's arrearage is $111,330.45 plus $1,494.06 for each month from January 2000 through the date of entry of judgment. *See* Plaintiffs' Ex. 3 and 49. Scohy's monthly retirement benefit thereafter will be $3,437.87 and shall be paid in accordance with the UPGWA's Pension Plan. *Id.*

24. Plaintiff Squier's current arrearage is $94,785.10 plus $1,647.82 for each month from January 2000 through the date of entry of judgment. *See* Plaintiffs' Ex. 4 and 49. Squier's month pension benefit thereafter shall be $2,478.82 and shall be paid in accordance with the UPGWA's Pension Plan. *Id.*

IV. CONCLUSION

For all of the foregoing reasons, the Court finds for Plaintiffs Gary Anderson, Louis Scohy and George Squier and against Defendants, and orders as follows:

IT IS HEREBY ORDERED that Defendants shall pay to Plaintiff Gary Anderson $92,562.25 plus $1,682.95 for each month from January 2000 through the date of entry of judgment. Thereafter, Plaintiff Anderson shall be paid a

monthly pension benefit payment of $1,682.95, which shall be paid in accordance with the UPGWA's Pension Plan.

IT IS FURTHER ORDERED that Defendants shall pay to Plaintiff Louis Scohy $111,330.45 plus $1,494.06 for each month from January 2000 through the date of entry of judgment. Thereafter Plaintiff Scohy shall be paid a monthly pension benefit payment of $3,437.87, which and shall be paid in accordance with the UPGWA's Pension Plan.

IT IS FURTHER ORDERED that Defendants shall pay to Plaintiff George Squier $94,785.10 plus $1,647. 82 for each month from January 2000 through the date of entry of judgment. Thereafter Plaintiff Squier shall be paid a monthly pension benefit payment of $2,478.82 which shall be paid in accordance with the UPGWA's Pension Plan.

IT IS FURTHER ORDERED that, pursuant to 29 U.S.C. § 1132(g)(1), Plaintiffs may file a verified and itemized petition for an award of attorneys' fees and costs.

/s/_____

Gerald E. Rosen
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 96-CV-70710-DT

[Filed January 4, 2000]

GARY ANDERSON, LOUIS SCOHY, and GEORGE SQUIER, Plaintiffs,	)
v.	)
INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA (UPGWA); INTERNATIONAL EXECUTIVE BOARD OF THE UPGWA; PENSION COMMITTEE OF THE UPGWA; and the RETIREMENT PLAN OF THE UPGWA, Defendants.	)

Hon. Gerald E. Rosen

JUDGMENT

The above-captioned case having been tried by the Court sitting without a jury; and the Court having this date entered an Opinion and Order Setting Forth its Findings of Facts and Conclusions of Law; and being otherwise fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that JUDGMENT be entered in favor of Plaintiffs Gary Anderson, Louis Scohy and George Squier and against the Defendants.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants shall pay to Plaintiff Gary Anderson $92,562.25 plus $1,682.95 for each month from January 2000 through the date of entry of judgment. Thereafter, Plaintiff Anderson shall be paid a monthly pension benefit amount of $1,682.95, which shall be paid in accordance with the UPGWA's Pension Plan.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants shall pay to Plaintiff Louis Scohy $111,330.45 plus $1,494.06 for each month from January 2000 through the date of entry of judgment. Thereafter Plaintiff Scohy shall be paid a monthly pension benefit payment of $3,437.87, which and shall be paid in accordance with the UPGWA's Pension Plan.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants shall pay to Plaintiff George Squier $94,785.10 plus $1,647.82 for each month from January 2000 through the date of entry of judgment. Thereafter Plaintiff Squier shall be paid a monthly pension benefit payment of $2,478.82 which shall be paid in accordance with the UPGWA's Pension Plan.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pursuant to 29 U.S.C. § 1132(g)(1), Plaintiffs may file a verified and itemized petition for an award of attorneys' fees and costs.

/s/_____
Gerald E. Rosen
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-1120

[Filed July 31, 1998]

GARY ANDERSON, et al.,	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
INTERNATIONAL UNION, UNITED	)
PLANT GUARD WORKERS OF	)
AMERICA, et al.,	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
No. 96-70710
Gerald E. Rosen, District Judge

Before: MARTIN, Chief Judge; MERRITT and CLAY, Circuit Judges.

OPINION

MERRITT, Circuit Judge. Plaintiffs, three former officers of defendant, The International Union, United Plant Guard Workers of America, were promised early retirement by the union president and the union's Executive Board and they contest the union's subsequent denial of early retirement benefits under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. We conclude that the union president and Executive Board may have had "apparent authority" to bind the union under standard agency principles. We therefore reverse the district court's summary judgment for defendants and remand for further factual findings on this issue.

I.

Plaintiffs Gary Anderson, Louis Scohy and George Squier are former executive officers of defendant, The International Union, United Plant Guard Workers of America. The other defendants are the International Executive Board, the Pension Committee and the Retirement Plan of the union.

The union is divided into regions, each of which is headed by a regional director. The president, vice-president, secretary/treasurer and regional directors are full-time officers of the union and members of the Executive Board. They are elected by union delegates at the union's convention held every five years. Plaintiffs Anderson and Squier are former union regional directors who were up for reelection in 1995. Plaintiff Scohy is a former vice-president of the union.

The union offers retirement benefits to certain of its employees. The plan is administered and interpreted by the Pension Committee, whose members are appointed by the

Executive Board. Under the terms of the plan, full retirement benefits accrue at age 60 and early retirement benefits are available on a reduced basis from the full retirement levels to covered employees aged 55 to 59 with at least five years of service. There is no provision for retirement benefits if the employee is less than 55 years old.

In December 1994, the union was experiencing a financial crisis that forced it to look for ways to reduce costs. One of the ways proposed to accomplish this was to eliminate certain officer positions within the union and offer those currently holding the identified positions "an early retirement window" with full retirement benefits, regardless of whether they would otherwise be eligible for full or early retirement benefits. Plaintiffs Anderson, Scohy and Squier were among those officers offered the special early retirement benefits. It is undisputed that plaintiffs did not meet the eligibility requirements for early retirement as of December 1994.

In order to extend the special early retirement benefits to plaintiffs and the other officers whose positions the union wished to eliminate, the eligibility criteria under the plan would require modification. The union president, Michael McConville, proposed that the Executive Board, of which he was a member, take action to modify the requirements for early retirement and to make the early retirements become effective in February 1995, rather than waiting to have them approved at the International Convention in May 1995. The Executive Board met and passed a resolution on December 7, 1994, that would modify the eligibility requirements to provide early retirement to plaintiffs and the other officers who would otherwise not have been eligible for early retirement. The resolution required the eligible officers to accept the package by December 8 -- the next day. After meeting with the union's attorney who assured them he

foresaw no legal problems, plaintiffs decided to accept the offer by letters signed on December 8, 1994. Unknown to plaintiffs, however, the union's attorney had written a letter to union president McConville on December 5, two days before his meeting with plaintiffs, stating that there would likely be an administrative or judicial challenge to the modification of the early retirement window based upon a violation of the union constitution and Section 501(a) of the Labor Management and Reporting Disclosure Act, 29 U.S.C. § 501. Although unaware of the letter, the record shows conflicting evidence as to whether plaintiffs had heard that the union's attorney had raised questions about a possible legal challenge to the proposed resolution before its passage.

The Executive Board then passed a resolution on December 9 consolidating, rearranging and dissolving certain regions, as allowed by the union's constitution and by-laws. The regions of which plaintiffs Anderson and Squier had been directors were to be eliminated as of February 15, 1995, the date the two men were to retire under the modified early retirement offer. The office of vice-president, held by plaintiff Scohy, was to be eliminated on the same date under the proposal.

On December 22, 1994, an Executive Board member who opposed the modified early retirement plan threatened to sue the union and its officers on the grounds that the early retirement offer violated the union constitution and Section 501 of the Labor Management Reporting and Disclosure Act. The legal challenge to the December 7 resolution modifying the early retirement plan was based in part on the union constitution that allows the Executive Board to amend the pension plan, but any early retirement benefits must be reduced from "normal" benefits that would accrue at age 60. Because the December 7 resolution offered full retirement

benefits, even though none of the men were 60 years of age, it was allegedly in violation of the union constitution unless the constitution was amended. The constitution can only be amended by a full membership vote.

On January 5, 1995, as a result of the threatened lawsuit, union president McConville suggested to the Executive Board that the early retirement and restructuring proposal be withdrawn for the time being and placed before the full membership in May for a vote. The Executive Board voted to defer implementation of the proposal until after the May convention. Plaintiffs continued in their positions until May 1995. Plaintiff Squier ran for reelection in May but lost, plaintiff Anderson did not run for reelection and the membership voted to eliminate the office of Vice-President that was held by Scohy.

Plaintiffs subsequently brought this lawsuit to receive benefits under the plan alleging violations of ERISA sections 1132(a)(1)(B) (breach of contract), 1132(a)(3)(B) (promissory and equitable estoppel), 1054(g)(2) (anti-cutback violation) and 1140 (interference with contractual relations). The district court granted summary judgment to defendants on all counts.

II.

The district court examined various theories under which plaintiffs might recover under ERISA and rejected them all. The relevant issue, however, as we see it, an issue not addressed by the parties or the court below, is whether agency principles of apparent authority bind the union to the terms of the resolution passed December 7 modifying the plan to grant early retirement benefits to plaintiffs.

In making this determination, we are guided by the law of agency as developed and interpreted as a matter of federal common law. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989). Under the federal common law of agency, apparent authority arises in those situations where the principal causes persons with whom the agent deals reasonably to believe that the agent has authority. *See Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982 (3d Cir. 1995) (supervisor of employee benefits was acting at least with apparent authority as agent of plan to council retiree on early retirement program).

It is well-settled that apparent authority (1) results from a manifestation by a person that another is his agent, regardless of whether an actual agency relationship has been formed and (2) exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized. *See generally* Restatement (Second) of Agency §§ 8, 27 & cmts. thereto. Specifically, a party may rely upon the apparent authority of union representatives to enter into an agreement where there is basis for such reliance. *National Labor Relations Bd. v. Truckdrivers, Chauffeurs and Helpers, Local Union No. 100*, 532 F.2d 569 570-71 (6th Cir. 1976). Because the record before us on this issue is limited, we remand for the district court to make further factual findings on whether principles of apparent authority can bind the union to the December 7, 1994 resolution. We leave it to the district court to decide if further discovery is necessary.

Specifically, the district court should determine if union president McConville, as president of the union and a member of the Executive Board, and the Executive Board, were acting within their apparent or actual authority as representatives of the union's retirement plan and whether plaintiffs reasonably relied upon this authority to enter into the agreement for early

retirement benefits. Whether plaintiffs' reliance was reasonable may turn, in part, on whether they were aware of the possible legal challenges to the December 7, 1994, resolution before they accepted the early retirement offer.

We note that defendants contend that the failure of the full membership to ratify the resolution rendered it void because ratification is required by the union constitution and bylaws. Apparent authority, however, may attach even when the agent's acts are unauthorized. Restatement (Second) § 159 & cmt. f. *See, e.g., Richards v. General Motors Corp.*, 991 F.2d 1227, 1232 (6th Cir. 1993) (employer contractually liable for ERISA benefits based on apparent authority of plan administrator). This circuit and others have repeatedly held that even in the presence of a ratification requirement, a third party may rely upon the apparent authority of the union representatives to enter into an agreement where there is a reasonable basis for such reliance. *See, e.g., Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098, 1111-12 (6th Cir. 1986) (side letter to collective bargaining agreement regarding pension payments was valid and binding on union even without required ratification); *accord Kozera v. Westchester-Fairfield Chapter of Nat'l Elec. Contractors Ass'n*, 909 F.2d 48, 54 (2d Cir. 1990) (agreement not ratified by union membership as required was nevertheless binding on union under principle of apparent authority); *Moreau v. James River-Otis, Inc.*, 767 F.2d 6, 9-10 (1st Cir. 1985) (provision in union constitution that local union cannot bind international union without written consent did not prohibit finding of apparent authority).

While the case law generally refers to the union's relationship with a third party outside the union, usually an employer, the apparent authority principles are relevant to the situation here in defining the relationship between the union

as a whole and the plaintiffs. The record amply demonstrates that the Executive Board and plaintiffs reached an agreement on December 8, 1994. On remand, the district court should determine whether plaintiffs knew or should have known about the ratification requirement and, if they did, what bearing that knowledge had on the reasonableness of any reliance plaintiffs placed on the authority of the union president and the Executive Board to enter into the agreement for early retirement benefits.

For the reasons stated above, we reverse the judgment of the district court and remand for further factual findings on whether principles of apparent authority can bind the union to the December 7, 1994, resolution.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 96-CV-70710-DT

[Filed January 17, 1997]

GARY ANDERSON, LOUIS SCOHY, and GEORGE SQUIER,
Plaintiffs,

v.

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA (UPGWA); INTERNATIONAL EXECUTIVE BOARD OF THE UPGWA; PENSION COMMITTEE OF THE UPGWA; and the RETIREMENT PLAN OF THE UPGWA,
Defendants.

Hon. Gerald E. Rosen

OPINION AND ORDER REGARDING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This ERISA action is before the Court on Defendants' Motion for Summary Judgment. Plaintiffs have responded to Defendants' Motion, to which response, Defendants have replied.[1] Having reviewed and considered the parties' briefs and supporting documents, including Plaintiffs' Memorandum of Supplemental Authority and the exhibits attached thereto, and having heard the oral arguments of counsel at the hearing held on November 14, 1996, the Court is now prepared to rule on Defendants' Motion. This Opinion and Order sets forth that ruling.

II. PERTINENT FACTS

Plaintiffs Gary Anderson, Louis Scohy and George Squier are former executive officers of the United Plant Guard Workers of America (UPGWA) (the"Union"). The UPGWA is divided into regions, each of which is headed by a regional director. The president, vice-president, secretary-treasurer, and the regional directors are full-time officers of the union and members of the International Executive Board (the

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[1] Plaintiffs have filed a Motion for leave to file a supplemental brief, with a copy of their proposed supplemental brief attached thereto. The Court has considered Plaintiffs' Motion and has determined that leave to file their proposed supplemental brief should be GRANTED. Accordingly, the Court has accepted for filing as a part of the record of this case the proposed Supplemental brief submitted by Plaintiffs on October 8, 1996, and the Court has reviewed and considered that Supplemental Brief in deciding Defendants' Motion for Summary Judgment.

"IEB"). Officers are elected by the general membership at the union's convention which is held every five years.

Plaintiffs Gary Anderson and George Squier are former UPGWA regional directors. They were elected to their regional directorship positions in 1990 and were up for reelection in 1995. Plaintiff Louis Scohy is the former vice-president of the union. He, too, was elected to his position in 1990.

During the course of Plaintiffs' tenure as union officers, in 1993-94, the UPGWA experienced severe financial difficulties and the IEB began exploring ways to cut costs and save money. In November 1994, in order to stem the union's financial losses, UPGWA President Eugene McConville proposed that the union be restructured so as to eliminate some regional directorships as well as the position of vice-president. He proposed that all full-time officers and directors who met certain eligibility requirements be offered an early retirement which would permit the elimination of their positions to effectuate the cost-saving restructuring envisioned. McConville proposed that the IEB take action to accomplish the restructuring and offer the early retirements effective February 1995, rather than waiting to have the restructuring and early retirements approved at the international convention in May 1995, because the union's accountants had advised that there would be a large savings to the union if it could eliminate the full-time positions prior to the convention.[2]

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[2] The UPGWA's constitution and by-laws authorize the IEB to rearrange, consolidate, dissolve or create additional regions if conditions warrant by a vote of 2/3 of the executive board. [See Defendants' Ex. 1, Constitution and By-Laws, Art. IX, § 4.] The constitution and by-laws also provide for the IEB to develop,

A special meeting of the IEB was called for December 6-9, 1994 to consider cost-cutting measures, including McConville's restructuring/early retirement proposals. At the special board meeting, the union's accountant, David Kaufman, made a presentation of the state of the UPGWA's financial affairs. Mr. Kaufman's schedules showed that the UPGWA faced a projected loss of $1 million for the fiscal year 1994-95 (i.e., April 1, 1994 to March 31, 1995). The IEB was also shown that by the elimination of the vice-president's position (which was a suggestion that had been under consideration for some time prior to the December 1994 meeting), $525,000 could be saved over the next five years. Kaufman's schedules also showed that the elimination of three regional directors would save $1.7 million over five years, and with other cost cuts, a total of $4.5 million could be saved over five years.

On December 7, 1994, the IEB passed a resolution which provided as follows:

> WHEREAS, the International Union faces a financial exigency which requires a reduction of staff, a rearrangement of regions, and a reassignment of duties, and
>
> WHEREAS, the circumstances require immediate action to stabilize the Union's financial position, and to establish a reorganized staff, internal administrative

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administer, maintain and amend a non-contributory Pension Retirement Plan for all full-time salaried union officers. Id. Article XI, § 2. Under the constitution and by-laws, early retirement is also specifically authorized. Id. § 2(b).

structure, and long range budget plan prior to the Constitutional Convention, and

WHEREAS, the Board has considered numerous alternatives, and has concluded that it is fair, reasonable and appropriate to reduce staff and reorganize regions through an early retirement program,

NOW, THEREFORE, it is hereby resolved that the International Union will offer an early retirement window to all full-time Union officers and directors, who meet the following eligibility requirements:

1. Must be 50 years of age or over as of December 31, 1994.

2. Retirement must cause one full-time position to be eliminated.

3. Retirement must be taken on February 15, 1995.

4. Acceptance of this window must be made by December 8, 1994.

All full-time officers and directors meeting the eligibility requirements, will be offered the following early retirement package:

1. An officer or director will receive ten (10) years allocated to age and/or service, at their discretion for pension benefit computation.

> 2. An officer or director shall be entitled to all benefits as stated in Article XI, Sections 1 and 2(e) of the Constitution and By-Laws of the International Union, United Plant Guard Workers of America (UPGWA), dated May 19, 1990.
>
> IT IS FURTHER RESOLVED that the Officers Retirement Plan be amended to incorporate this early retirement window, and the International President and International Secretary-Treasurer are directed to take such action as is necessary and appropriate to implement this Resolution.

[Defendants' Ex. 3.]

Upon the Board's adoption of the early retirement resolution, Anderson, Scohy and Squier considered taking advantage of it. But for the December 7, 1994 resolution, none of the Plaintiffs would have been eligible for early retirement under the UPGWA Retirement Plan. Under the terms of the Plan, a covered employee is entitled to full retirement only if he is at least 60 years of age, or a reduced retirement benefit if he is under age 60 but over age 55 and has completed at least five years of service. [Defendants' Ex. 2, Art. IV, § 3.] No provision is made for retirement under age 55. Neither Plaintiff Anderson nor Plaintiff Scohy was 55 years old,[3] and neither had completed the required five years of service. As for Plaintiff Squier, although he was 59 years of age, he, like Anderson and Scohy, had not yet completed five years of service.

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[3] Gary Anderson did not turn 55 until August 22, 1996. Louis Scohy did not turn 55 until September 17, 1996. [See Plaintiffs' Ex. N.]

Before finally deciding to accept early retirement as provided in the resolution, Plaintiffs asked the union's attorney, Gordon Gregory, for a private meeting. At that meeting, Plaintiffs asked Mr. Gregory if he saw any legal problems with the early retirement proposal. According to Plaintiffs Anderson and Scohy, Mr. Gregory assured them that he knew of no problems. [See Anderson Affidavit, Plaintiffs' Ex. A ¶¶ 10-11; Scohy Affidavit, Plaintiffs' Ex. B ¶¶ 8-9.]

However, two days before meeting with Plaintiffs, on December 5, 1994, Mr. Gregory had written a letter to Union President McConville responding to McConville's request of November 28 that he review the resolution. In his letter to McConville, Gregory opined that the proposed early retirement plan complied with ADEA, OWBPA, ERISA, and the IRC, but that he believed that it was likely that there would be an administrative and/or judicial challenge to the early retirement window based upon a violation of Article XI, Section 2 of the Union Constitution and Section 501(a) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 401 et seq. Gregory explained in his letter:

Constitutional Considerations

> Article XI, Section 2 of the International Constitution incorporates by reference a "Pension Retirement Plan." It states in part that "The International Executive Board is empowered to formulate, maintain, and amend a Pension Retirement Plan to include, but not to exceed the following." Subparagraphs (a) and (b) provide for five years of service and age sixty (60) for normal retirement benefits. There is no express language limiting the

Board's initiative and authority regarding early retirement eligibility and benefits.

An argument could be made, however, that the specific references to age 60 and five years of service preclude any plan amendment to achieve early retirement without reduction of the retirement benefit. Note that Article XI, Section 2, (b) states] that "... early retirement benefits shall be in accordance with the normal retirement age." Thus a challenge to the proposed retirement window would claim that the grant of normal retirement benefits to anyone prior to age 60 would "exceed" the benefits outlined in the Constitution. It is, of course, a question of interpretation.

It appears that the Article XI, Section 2 Board authority to "amend" the pension plan includes the right to "formulate" an early retirement window if otherwise warranted by special circumstances.

Legal Considerations

Section 50 l(a) of the LMRDA provides as follows:

> "Sec. 501. (a) The officers. . . of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members. . . and to manage, invest, and expend the same **in accordance with its constitution and bylaws** and any resolutions of

> the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party. . . or acquiring any pecuniary or personal interest which conflicts with the interests of such organization . . . .

I predict and anticipate that a member or members may challenge the early retirement window as constituting a violation of Section 501(a) by each officer voting for it and/or receiving its benefits. Albeit the purpose of the plan is to reduce staff and costs, it will be a fact question for a judge or jury as to whether the plan was prudent at the time of its adoption by the International Executive Board. Opponents of the plan may allege as follows:

> [Gregory goes on to set out six possible arguments that could be raised against the plan.]

* * *

Legal research failed to disclose a case or administrative ruling directly in point. The absence of a case, however, does not mean that the proposed plan is legal or illegal. It probably means that no union adopted a similar plan or one which was challenged by its members. Needless to say, each case is decided on its facts and merits. It would be a question of fact whether the early retirement window was in effect "solely for the benefit of the organization and its members" or **whether it should have been deferred and submitted to the Convention**. No matter how noble the motive, there can still be a violation of Section 501(a) of the LMRDA.

> Prospective early retirees will undoubtedly ask if the International Union can guarantee the early retirement benefits in the event of a challenge, and indemnify them for costs and attorneys fees. The answer is no if a violation of Section 501(a) is found. Individual union officers can only be reimbursed after a finding that 501(a) was not violated. Moreover, the early retiree would be directly involved by virtue of his vote to eliminate his position and to approve the early retirement window.
>
> **I believe that there will be an administrative and/or judicial challenge to the early retirement window. Predictably, it will raise the allegations set forth above....**

[Plaintiffs' Ex. E (emphasis added).]

There is no evidence of record showing that Gregory's letter or any concerns raised therein were ever presented to the IEB prior to the adoption of the early retirement resolution.[4]

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[4] Although no evidence has been presented to the Court which would establish that the Plaintiffs were made aware of the possibility of a viable Section 501 challenge to the early retirements prior to voting on the resolution at the December 7, 1994 IEB meeting, Plaintiffs do state in their initial Opposition Brief that "[d]uring discovery, Defendants have presented witnesses who have testified that, at or before the special meeting of the IEB, Plaintiffs were told of the possibility of a valid § 501 claim to challenge the early retirement contracts." [See Plaintiffs' initial Brief p. 3.] Plaintiffs, however, deny that the were told of that possibility either before or during the meeting. Id. They state that they never would have accepted early retirement or voted for the redistricting plan (which eliminated Plaintiff Anderson's and Plaintiff Squier's

Five or six officers were eligible for the early retirement window provided in the December 7, 1994 Resolution. Plaintiffs Anderson, Scohy and Squier decided to take advantage of it, and on December 8, each accepted the early retirement offer in writing:

> I hereby accept the offer set forth in the International Executive Board Resolution of December 7, 1994, offering an early retirement window to all eligible full-time officers and directors.
>
> My date of retirement shall be February 15, 1995.
>
> I understand I will receive the following pension benefits commencing upon my retirement:
> Monthly pension of $1,682.95.[5]
>
> /s/

[Defendant's Ex. 4.]

On December 9, the IEB passed another resolution, this one consolidating, rearranging, and dissolving certain regions. Regions 2 and 4, of which Plaintiffs Squier and Anderson had been the directors, were to be dissolved effective February 15, 1995, i.e., the date on which Plaintiffs

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Regions) if they had been informed of the possibility of a valid § 501 claim. [See Andersons Affidavit, Plaintiffs' Ex. A, ¶ 12; Scohy's Affidavit, Plaintiffs' Ex. B ¶ 10.]

[5] This sum is the pension amount set forth in Gary Anderson's acceptance. Louis Scohy's acceptance stated that his monthly pension would be $3,437.87. George Squier's acceptance stated that his monthly pension would be $2,478.82.

retirements under the December 7 resolution were to become effective. No action was taken at the IEB December 6-9 meeting to eliminate the vice-president's position.[6]

Not all members of the executive board, however, were in favor of the restructuring and early retirements. On December 22, 1994, Jack Webb, another regional director, wrote a letter to President McConville threatening to sue the union and its officers on the ground that the early retirements violated the union constitution and § 501(a) of the Labor Management Reporting and Disclosure Act (the "LMRDA"). Webb's letter stated in pertinent part, as follows:

Dear Brother McConville,

> I am deeply troubled by the International Executive Board's resolution at its December 7, 1994 meeting to offer early retirement packages to officers and regional directors, and I am aware that many other members of this Union share my concerns. It appears to me that you and other officers of the Board have intentionally violated the UPGWA constitution and your fiduciary duty as officers by adopting the resolution.
>
> Our constitution provides:
>
> > "The International Executive Board is empowered to formulate, maintain, and amend a Pension Retirement Plan... <u>not to exceed the following</u>:

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[6] It is undisputed that to eliminate the vice-president's position, a constitutional amendment was required, and hence, such action had to await a vote of the membership at the 1995 International Convention.

> "The normal retirement age shall be sixty (60) years. [D]isability and early retirement benefits shall be in accordance with the normal retirement age." Art. XI, Sec 2(b)
>
> * * *

You surely knew that modifications of the Retirement Plan require amendments to the Plan, and that the expansion of early retirement benefits contained in the December 7th resolution requires an amendment to the Constitution.... Even though only a few months' wait would have been required to present the proposal to the Convention, in a lawful manner, you chose to proceed by way of Executive Board resolution because you know as well as I do that this proposal does not stand a chance of being approved by the Convention.

You have not asked the Board to adopt the required amendment to the Retirement Plan, probably because it would have been so painfully clear to the entire Board, if you had done so, that the required Plan amendment would violate the Constitution's prohibition against any amendments to the Plan that create benefits exceeding the explicit constitutional limit on early retirement benefits.

* * *

By this letter, I am asking that you provide an explanation of why the December 7th Board resolution does not violate our Constitution....

We intend to sue to enjoin the implementation of the December 7th resolution before its effective date, if you do not provide a satisfactory response to this letter. I would much prefer to resolve this problem without a lawsuit. We could resolve this crisis by a

Board decision to reconsider its December 7th resolution and to withdraw it.

Fraternally,

/s/
Jack H. Webb, Region One Director

c: Scohy, Anderson, Squier, Harvey

[Defendants' Ex. 6.]

The real threat of legal action as vowed by Webb was confirmed by the union's attorney in an opinion letter and legal memorandum sent to President McConville on January 4, 1995. [See Plaintiffs' Ex. K.]

Threatened with the expense and uncertain outcome of Webb's lawsuit, on January 5, 1995, McConville submitted Webb's suggestion that the restructuring/early retirement proposal be placed before the full membership at the International Convention to the IEB for a vote on a Referendum Ballot:

Dear Brothers and Sister:

REFERENDUM

In consideration of the threat of expensive, time-consuming, and divisive litigation to attack and set aside the Board's Resolutions of December 7 and 9, 1994, providing financial savings through accepted early retirement incentives, and necessary realignment of Regions to reduce the number of full-time officers, should the Board defer implementation of its

Resolution, maintain the status quo, and submit the matter to the forthcoming International Convention?

YES_____ NO_____

Please signify your approval or disapproval as indicated above, and return to this office as soon as possible.

Sincerely & Fraternally,
/s/
Eugene P. McConville
International President

PRINT NAME:_____
(SIGNATURE):_____
DATE:_____

[Defendants' Ex. 7.]

The Board voted to defer implementation of the December Resolutions and submit the matter to the Convention in May 1995. Plaintiffs continued in their officer positions until the May 1995 Convention. Squire ran for re-election as regional director, but lost. Anderson did not seek re-election. The membership also voted at the Convention to amend the union's constitution to eliminate the office of vice-president which had been held by Scohy.

Plaintiffs immediately thereafter instituted litigation against the union and others, including two state-court

lawsuits alleging state claims,[7] and this separate federal ERISA action.

In September 1995, Squier filed an application for retirement benefits under the UPGWA Retirement Plan and was granted his normal retirement benefits thereunder. Neither Anderson nor Scohy ever filed a formal application for retirement benefits under the Plan.

In their Complaint in this ERISA action, Plaintiffs allege five Counts against the UPGWA, the International Executive Board of the Union, the UPGWA Pension Committee, and the UPGWA Retirement Plan.

In Count I, Plaintiffs allege an ERISA § 502(a)(1)(B) claim to recover benefits they claim are due to them under the UPGWA Retirement Plan. In Counts II and III, Plaintiffs assert claims of "promissory estoppel", and "equitable estoppel" under the "other appropriate equitable relief"

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[7] The two state court cases were filed in Macomb County Circuit Court. In the first case, Anderson, et al. v. McConville, et al., No. 95-2084-NZ, the court dismissed Plaintiffs' Breach of Contract, Promissory Estoppel and Equitable Estoppel claims on ERISA preemption grounds, but held that Plaintiffs' Fraudulent and Negligent Misrepresentation claim, Interference with Contractual Relations and/or Business Relationships claim, and Elliott-Larsen age discrimination and retaliation claims were not preempted. In Plaintiffs' second state court action, Anderson, et al. v. Gregory, et. al., No. 95-3631-NZ, Plaintiffs are suing the union lawyers for legal malpractice/violation of fiduciary duties (Count I), fraudulent and/or negligent misrepresentation/silent fraud (Count II), and interference with contractual relations and/or advantageous business relationships (Count III). It appears that these state court actions are still pending.

provision of ERISA § 502(a)(3)(B). Count IV of Plaintiffs' Complaint alleges a violation of ERISA § 204(g)'s "anti-cutback provisions". In Count V, Plaintiffs allege an ERISA § 510 claim of interference with their protected ERISA rights against the Union and the International Executive Board, only.

In the instant Motion, Defendants seek summary judgment and dismissal of Plaintiffs' Complaint in its entirety, contending that:

1. Plaintiffs' claim for early retirement benefits is barred because they failed to exhaust their remedies under the UPGWA Plan;

2. Plaintiffs are not entitled to early retirement benefits under the terms of the UPGWA Plan;

3. Plaintiffs are not entitled to early retirement benefits under a theory of promissory or equitable estoppel;

4. Defendants did not violate the anti-cutback provisions of ERISA § 204(g);

and

5. The UPGWA and/or the IEB did not interfere with any protected rights of Plaintiffs in violation of § 540 of ERISA.

III. DISCUSSION

A. STANDARDS APPLICABLE TO MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is proper "'if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Fed. R. Civ. P. 56(c).

Three 1986 Supreme Court cases -- Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) -- ushered in a "new era" in the standards of review for a summary judgment motion. These cases, in the aggregate, lowered the movant's burden on a summary judgment motion.[8] According to the Celotex Court,

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that

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[8] "Taken together the three cases signal to the lower courts that summary judgment can be relied upon more so than in the past to weed out frivolous lawsuits and avoid wasteful trials." 10A C. Wright, A. Miller. M. Kane, Federal Practice & Procedure, § 2727, at 35 (1996 Supp.).

party's case, and on which that party will bear the burden of proof.

Celotex, 477 U.S. at 322.

After reviewing the above trilogy, the Sixth Circuit established a series of principles to be applied to motions for summary judgment. They are summarized as follows:

* Cases involving state of mind issues are not necessarily inappropriate for summary judgment.

* The movant must meet the initial burden of showing "the absence of a genuine issue of material fact" as to an essential element of the non-movant's case. This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.

* The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment."

* The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.

* The trial court has more discretion than in the "old era" in evaluating the respondent's evidence. The respondent must "do more than simply show that there is some metaphysical doubt as to the material facts." Further, "[w]here the record taken as a whole could

> not lead a rational trier of fact to find" for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is plausible.

Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir. 1989). See also, Nernberg v. Pearce, 35 F.3d 247, 249 (6th Cir. 1994). The Court will apply the foregoing standards in deciding Defendants' Motion for Summary Judgment in this case.[9]

B. STANDARD AND SCOPE OF JUDICIAL REVIEW IN ERISA CASES

The Supreme Court has ruled that the standard of review in ERISA cases is de novo unless the benefit plan gives the plan administrator discretion to determine eligibility for benefits or to construe plan terms:

> As this case aptly demonstrates, the validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue. Consistent with established principles of trust law, we hold that a denial of benefits challenged under Section

---

[9] Plaintiffs contend that Defendants' Motion is deficient because Defendants only offer document exhibits in support for their Motion and have failed to offer any depositions or affidavits (or interrogatory responses or admissions). Plaintiffs are mistaken. The plain language of Rule 56 provides that a party may move for summary judgment "with or without supporting affidavits... depositions, [or] answers to interrogatories." See Fed. R. Civ. Pro. 56 (a), (b) and (e). There is no requirement as to the type of evidence that may be offered to support a summary judgment motion.

> 1132(a)(1)(B) is to be reviewed under a de novo standard **unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.**

Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S.Ct. 948, 956 (1989) (emphasis added). Thus, it is clear that if the benefit plan gives the plan administrator "discretionary authority to determine eligibility for benefits or to construe the terms of the plan", the appropriate standard to be applied by the trial court in reviewing a plan administrator's denial of benefits decision is the "arbitrary and capricious" standard. See, Metropolitan Life Ins. Co., 925 F.2d 979 (6th Cir. 1991).

In this case, the UPGWA Plan provides that the International Executive Board of the Union shall be the "Plan Administrator" with the responsibility of the general administration and the carrying out the provisions of the Plan delegated to a committee of three members designated by the IEB. The Plan expressly provides that the pension committee has the exclusive right "[t]o make findings of facts and determinations as to the rights of any Covered Employee applying for benefits" and "to interpret the Plan and decide finally and conclusively any questions that may arise in connection with the Plan." [See Defendants' Ex.2, Art. IX, § 2.] The Plan further provides that "[a]ny interpretation of the provisions of the Plan by the Committee shall be final and conclusive." Id., Art. IX, § 1.

The foregoing discussion makes clear that the express provisions of the Plan grant the Plan Administrator the discretionary authority described by the Supreme Court in Bruch and the Sixth Circuit in Miller which calls for

application of an "arbitrary and capricious" standard in reviewing Plaintiffs' denial of early retirement benefits claim in this case.

C. PLAINTIFFS' CLAIM FOR EARLY RETIREMENT BENEFITS

In Count I of their Complaint, Plaintiffs assert a claim for early retirement benefits under Section 502 of ERISA, 29 U.S.C. § 1132(a)(1)(B), which provides that a participant in an ERISA Plan may bring a civil action

> to recover benefits due to him under the plan, to enforce his rights under the terms of the plan, or to clarify, his rights to future benefits under the terms of the plan ....

Defendants argue first that Plaintiffs' Count I should be dismissed because Plaintiffs did not exhaust their intra-plan remedies. Under the terms of the UPGWA Plan, in order to receive a retirement benefit, a covered employee must apply to the pension committee on an approved application form. [See, Defendants' Ex. 2, Art. 7, § 1. See also, Ex. 8.] If the employee's application is denied, the Plan further provides that he then may appeal that denial in writing to the Pension Committee. [Ex. 2, Art. 7, § 2.]

Defendants are correct that, under established law, an employee may not claim benefits under an ERISA plan where he has failed to make a written application for benefits as required by the plan, Stuhlreyer v. Armco, Inc., 12 F.3d 75, 78-79 (6th Cir. 1993), and where the plan provides an appeal procedure, a plan participant must exhaust that administrative appeal before commencing a judicial action to recover benefits, Baxter v. C.A. Muer Corp., 941 F.2d 451,453-54

(6th Cir. 1991). However, the facts of this case with respect to Plaintiffs Anderson, Scohy and Squier do not support Defendants "failure to exhaust" argument.

On May 1, 1995 -- i.e., after the IEB decided to defer implementation of its early retirement cost-savings proposal until the Union Convention, but before the full membership voted at the Convention on May 18, 1995 not to implement the plan -- Plaintiffs' attorney, E. Michael Morris, sent a letter to the UPGWA Pension Committee, which stated as follows:

> Dear Pension Committee:
>
> As you know, members Gary Anderson, Lou Scohy, and George Squier executed written contracts with the UPGWA, approved by the International Executive Board, with respect to certain pension benefits and rights. We represent each of these members, and we respectfully request a prompt response as to whether the Pension Committee will direct that the UPGWA honor its obligations as set forth in the agreements with our clients. We believe that agents of the union have already stated that the UPGWA will not voluntarily honor the agreements with our clients relating to pension benefits, but if this is not accurate, you should advise us at once.
>
> Because we assume that the denial of the contractual benefits was made with the consent of the Pension Committee, you may treat this letter as an appeal to your retirement board with respect to

these benefits. Again, please advise at the earliest possible moment of your position.

[Plaintiffs' Ex. M (emphasis added).]

On May 5th, union attorney Gordon Gregory responded to Mr. Morris's letter on behalf of the Pension Committee:

Dear. Mr. Morris:

I am responding to your letter/appeal to the Pension Board Committee. You ask whether the Pension Committee will direct the UPGWA to honor the "agreements" with your clients. Further, you request that your letter be treated as an "appeal" to the Retirement Board.

As you undoubtedly know, Article VII, Retirement Benefit Payments, of the applicable Pension Plan states in Section 1 (Application) that "[i]n order to receive a Normal or Early Retirement Benefits... a Covered Employee shall make written application to the Committee for such benefit..." The Pension Committee has not received a written request for any retirement benefit from any of your clients.

Your appeal to the Retirement Board will be treated as an appeal pursuant to Article VII, Section 2 (Appeal to Retirement Board). In the near future the Committee will notify each of your clients in writing, the reason he is not receiving benefits, and notice of "the opportunity to appear before the Committee to present his case, and to review pertinent documents relating to any denial and to submit issues and comments in person or in writing."

> Since your client, Lou Scohy, is a member of the Pension Committee, it is expected that he will recuse himself from that role during the process. In the event that he refuses to do so, please notify me in writing no later than Monday, May 8, 1995.

Id.

It is clear that, as of May 5, 1995, the Union had deemed Plaintiffs to have applied for, and been denied, the benefits which they seek in this action. It is further evident that the Union treated Mr. Morris's letter of May 1 as a written appeal to the Pension Committee of the denial of benefits. Further, it appears that the Pension Committee never took any action on Plaintiffs' "appeal" simply because it deemed such action to be futile in light of Plaintiffs initiation of judicial action.[10]

Where resort to the administrative route would be futile, exhaustion of ERISA administrative remedies is not required. Constantino v. TRW, Inc., 13 F.3d 969, 974 (6th Cir. 1994; Ollson v. Darling and Co., 759 F. Supp. 389-90 (E.D. Mich. 1991). The futility doctrine is properly invoked in cases where it can be established that the claimant "has been or will be wrongfully denied meaningful access to the internal remedies." See, Bemis v.Hogue, 635 F. Supp. 1100, 1104-1105 (E.D. Mich. 1986). See also, Lucas v. Warner & Swasey Co., 475 F. Supp. 1071 (E.D. Pa. 1979). The Court views the union's decision in this case to forego convening the

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[10] Defendants state in footnote 1 at page 5 of their initial summary judgment brief that "[a]rrangements were made to convene the pension committee at the May convention to hear plaintiffs' appeals. However, plaintiffs commenced litigation against the union and President McConville prior to the convention."

pension committee and proceeding with the intra-plan appeal process, opting instead to defend the judicial actions filed by Plaintiffs, as a denying Plaintiffs "meaningful access to internal remedies". Therefore, the Court will not dismiss this action based upon Plaintiffs' failure to exhaust administrative remedies.

Defendants next argue that, even if exhaustion is not required, Plaintiffs would not have been entitled to early retirement benefits under the plan.

Under the terms of the UPGWA Plan, a covered employ may qualify for early retirement only if he has completed five years of service and has attained his 55th, but not 60th birthday. [See Defendants' Ex. 2, Art. III, § 2.] None of the Plaintiffs qualified for early retirement as of February 1995. In fact, Plaintiffs Scohy and Anderson would not even qualify for reduced-benefits early retirement under the Plan until more than a year after the May 16-18, 1995 Convention.[11]

Plaintiffs appear to take the position that the Court should deem "terms of the Plan" as including the December 7, 1994 IEB resolution and treat that resolution, even though the IEB subsequently voted to defer implementation of that resolution

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[11] Scohy and Anderson will not qualify for full unreduced benefits for another four years. (The Court was advised at the November 14 hearing, however, that Plaintiff Scohy has been receiving reduced 55-year-old retirement benefits since October 1, 1996.) As for Plaintiff Squier, while he met the age requirement (he was 59 years old) for reduced early retirement in December 1994, he did not complete five years of service until after the May 1995 Convention. As indicated above, Squier did ultimately formally apply for, and was granted, normal full retirement benefits under the Plan in September 1995, after he turned 60.

until the May 1995 Convention (and the full membership voted at the Convention not to implement it), as having amended the terms of the Plan as of December 1994 and entitling them to early retirement benefits pursuant to the resolution as of February 1995.

Essentially, Plaintiffs are seeking to enforce purported "contracts" with the Union which their own expert, former Judge Richard Kaufman, has opined would be illegal under the terms of the Union Constitution and governing federal labor law. [See Kaufman Dep., Defendants' Ex. 12, pp. 91-95.] As Judge Kaufman observed, without an amendment of the union constitution (which requires a vote of the full membership) the proposed early retirement proposal violated the language of the union constitution which requires that for unreduced early retirement benefits, the prospective retiree must be at least 60 years old. [Defendants' Ex. 1, Article XI, § 2.] Plaintiffs provide no authority deeming their December 8, 1994 "contracts" legal. They merely state that "Plaintiffs do not agree that their early retirement was subject to a vote of the 1995 Convention." [Plaintiffs' Response Brief, p. 14.]

As Defendants point out, it is elementary that contracts which are illegal and against public policy are void and will not be enforced. Kukla v. Perry, 361 Mich. 311, 323-25, 105 N.W.2d 176 (1960); 17 Am. Jur. 2d, Contracts § 238 (1991). Given the questionable legality of the December 7 early retirement proposals, the IEB had a fiduciary duty to defer the issue to the Convention to avoid a costly (and probably successful) legal challenge to them.[12]

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[12] Apparently in response to the Court's colloquy with counsel at the November 14, 1996 hearing regarding Judge Kaufman and his opinion that it would have been illegal for the IEB to implement the early retirement proposal without first putting the matter to a

Based upon the foregoing discussion, the Court finds that Plaintiffs' Count I must be dismissed. Plaintiffs have no meritorious ERISA claim based upon their purported December 8, 1994 "contracts" for early retirement benefits.

D. PLAINTIFFS' HAVE NOT MADE OUT A CLAIM OF EQUITABLE OR PROMISSORY ESTOPPEL

In Counts II and III of their Complaint, Plaintiffs allege claims of promissory and equitable estoppel under the "other appropriate equitable relief" provision of 29 U.S.C. § 1132 (a)(3)(b). As Defendants point out, although the Sixth Circuit has recognized application of estoppel principles in ERISA actions for health or welfare benefits, see Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir. 1991), it has indicated that estoppel principles might not apply to claims for pension benefits, which, have strict vesting and accrual requirements. See also, Black v. TIC Investment Corp., 900 F.2d 112 (7th Cir. 1990) in which the Seventh Circuit, although expressing no opinion as to the application of estoppel principles in the pension context, the court noted that

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vote of the full union membership. Plaintiffs have provided the Court with a post-hearing "Memorandum of Supplemental Authority" in which they cite case law for the proposition that if a contract is illegal, in certain circumstances, it may still be enforced in favor of a non-culpable party. Even accepting Plaintiffs' citations of supplemental authority, the cases cited do not deal with the issue presented in this case, i.e., whether in light of the board's ERISA fiduciary duties concerning the pension fund, the IEB acted arbitrarily and capriciously when it decided by majority vote to defer implementing the enhanced early retirement proposal until a vote of the full union membership could be taken at the May 1995 Convention in order to avoid a costly and potentially unsuccessful legal battle.

it had "serious doubts" as to the advisability of employing estoppel principles in determining whether an individual will receive benefits from an employer-funded pension plan, as opposed to a welfare benefits plan.

However, even if estoppel principles were to apply, both equitable estoppel and promissory estoppel require a showing of detrimental reliance.[13] Plaintiffs, here, cannot show any detrimental reliance upon the December 7-9, 1994 resolutions

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[13] The elements of equitable estoppel are:

1) conduct or language amounting to a representation of material fact;
2) awareness of the true facts by the party to be estopped;
3) an intention on the part of the party to be estopped that the representation be acted on, or conduct toward the party asserting the estoppel such that the latter has a right to believe that the former's conduct is so intended;
4) unawareness of the true facts by the party asserting the estoppel; and
5) detrimental and justifiable reliance by the party asserting estoppel on the representation.

Armistead, supra, 944 F.2d at 1298.

The elements of promissory estoppel are:

1) a clear and unambiguous promise;
2) a reasonable and foreseeable reliance by the party to whom the promise is made; and
3) an injury sustained by the party asserting the estoppel by reason of the reliance.

Sprague v. General Motors Corp., 2 F.3d 1425, 1441 (6th Cir. 1996).

prior to the IEB's decision to defer implementation of the resolutions on January 5, 1995. Although Plaintiff Squier did send a letter to his constituents during that less than one-month time period stating that he would not be running for reelection, he sent them another letter in January, after he knew the early retirements might be challenged, advising them that he would, in fact, be running for reelection. Squier did run, but lost his reelection bid at the Convention. Anderson, too, knew by January 1995 that the early retirements had been challenged and were in doubt, and he was free to run for reelection, but he chose not to do so.[14] Scohy can point to nothing that he did in detrimental reliance on the resolutions prior to the January deferral decision. His position was simply eliminated.

Plaintiffs do not dispute the absence of specific evidence of detrimental reliance, but instead, argue only that "the promise must be enforced if injustice is to be avoided." [See p. 17 of Plaintiffs' Response Brief.] As the Supreme Court

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[14] To the extent that Plaintiffs Squier and Anderson argue that evidence of detrimental reliance can be found in their having lost, or decided not to run for, reelection, by their own account of the facts, their loss of their regional director seats was due to a subsequent redistricting plan proposed by President McConville on January 24, 1995, and voted upon by the IEB, i.e., after the Board had decided by its referendum vote of January 5, 1995 not to implement the December early retirement and redistricting resolutions. [See pp. 6-7 of Plaintiffs' Opposition Brief.] Further, although Plaintiffs have also attempted to make out a reliance argument based upon the union attorney's alleged assurance that he knew of nothing illegal about the early retirement proposal, as the Court stated on the record on November 14, Plaintiffs were not Mr. Gregory's clients, and therefore, they cannot rely on the union attorney's advice to establish *justifiable* reliance.

has held, where the party opposing a motion for summary judgment has no evidence to support an essential element of his or her case, summary judgment should be entered in favor of the movant. Celotex Corp. v. Catrett, supra, 106 S.Ct. at 2554.

For these reasons, Defendants' Motion for Summary Judgment will be granted on Counts II and III.

E. PLAINTIFFS' CLAIM OF VIOLATION OF § 204 OF ERISA IS WITHOUT LEGAL MERIT

In Count IV of their Complaint, Plaintiffs allege that "by breaching and repudiating" their early retirement "contracts", Defendants violated the anti-cutback provisions of Section 204 of ERISA, 29 U.S.C. § 1054(g)(2).

Section 204(g) provides in pertinent part:

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than by an amendment described in section 1082(c)(8) [amendments relating to plan funding limitations] or 1441 [amendment of a plan to reduce benefits for conservation of assets of terminated plans] of this title.
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of--
>
> > (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
> >
> > (B) Eliminating an optional form of benefit,

> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the pre-amendment conditions for the subsidy ....

29 U.S.C. § 1054(g).

This section, however, only prohibits an employer from decreasing a participant's "accrued benefit" by amending a pension plan. As explained by the Third Circuit in construing this section in Berger v. Edgewater Steel Co., 911 F.2d 911 (3rd Cir. 1990), cert. denied, 499 U.S. 920 (1990), an ERISA denial of early retirement case:

> The legislative history [of the amendments to § 204] explains that... § 204(g):
>
> > generally protects the accrual of benefits with respect to participants who have met the requirements for a benefit as of the time a plan is amended [to eliminate the benefit] and the participant who subsequently meets the preamendment requirements. The bill does not, however, prevent the reduction of a subsidy in the case of a participant who, at the time of separation from service (whether before or after the plan amendment) has not met the preamendment requirements [for entitlement to the benefit].

911 F.2d at 918, quoting S. Rep. No. 575, 98th Cong., 2d Sess. 28, *reprinted in* U.S. Code Cong. & Admin. News 2547, 2574.

Here, under the "preamendment" terms of the UPGWA plan, in order to be entitled to unreduced early retirement benefits, a participant must (1) have completed five years of service and (2) be at least 60 years of age. [Defendants' Ex. 2, Art. III,§ 2 and Art. IV § 3.][14] Plaintiffs Scohy and Anderson did not have any "accrued" right under the pre-"amendment" plan to early retirement either prior to the January 5, 1995 referendum vote deciding not to implement the early retirement resolution or thereafter. Although they both presumably completed five years of service as of the May 1995 Convention, neither has yet reached age 60.[15] Since Plaintiffs did not meet the conditions for entitlement to early retirement under the "pre-amendment" plan, 29 U.S.C. § 1054(g), by its own terms, does not apply. Defendants, therefore, are entitled to summary judgment on Count IV.

F. PLAINTIFFS HAVE NO LEGALLY COGNIZABLE § 510 CLAIM

In Count V of their Complaint, Plaintiffs assert a claim against the UPGWA and its IEB for alleged interference with

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[14] A plan participant may elect to retire at age 55, however, he/she is not entitled to unreduced retirement benefits until age 60. [Art. IV § 3(ii)].

[15] Plaintiff Squier did turn 60 on March 9, 1995, and as of the May 1995 Convention, he had completed five years of service. Squier retired in September 1995 and was granted his normal retirement benefits under the UPGWA plan.

their rights under the UPGWA plan and ERISA pursuant to § 510 of ERISA, 29 U.S.C. § 1140.

Section 510 provides, in pertinent part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan...or for the purpose of interfering with the attainment of any right to which such participant may be entitled under the plan.

29 U.S.C. § 1140.

Section 510 was designed to protect the employment relationship which gives rise to an individual's pension rights. West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980). In order to establish a § 510 claim, a plaintiff must establish that the employer took some adverse employment action against him and that an intent to interfere with pension benefits was a motivating factor in the adverse employment decision. Humphreys v. Bellaire Corp., 966 F.2d 1037, 1043 (6th Cir. 1992). Section 510 provides no relief for the elimination of benefits independent of employee termination, demotion, discipline or other adverse employment action. Teumer v. General Motors Corp., 34 F.3d. 542, 544-45 (7th Cir. 1994).

In this case, neither the UPGWA nor its IEB terminated or otherwise interfered with Plaintiffs' employment. All three Plaintiffs remained full-time officers of the union after the IEB decided not to implement the December 1994 early retirement proposal. At the May 1995 Convention, Squier lost his office because he was defeated in his bid to run for reelection. Anderson lost his office because he decided not to

run. Scohy lost his office because the membership voted to amend the Union Constitution to eliminate the vice-president's position. None of these actions were adverse actions within the purview of Section 510 of ERISA, and there is no evidence of record to establish that any of these actions were motivated by an intent to deprive Plaintiffs of their ERISA-protected accrued pension benefits. Indeed, the IEB's decision not to implement the early retirement resolution occurred nearly six months before the Convention at which Plaintiffs lost their positions.

For these reasons, the Court finds that Plaintiffs have not established a Section 510 claim. Therefore, summary judgment will be entered on Count V.

CONCLUSION

For all of the reasons stated in this Opinion and Order,

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment in this ERISA action will be, and hereby is, GRANTED. Plaintiffs' Complaint, therefore, will be dismissed in its entirety, with prejudice.

Let Judgment be entered accordingly.

/s/_____
Gerald E. Rosen
United States District Judge

APPENDIX F

SEE FOLD OUT EXHIBIT

Contract of Louis Scohy

Louis Scohy

To: International Union,
United Plant Guard Workers of America (UPGWA)

I hereby accept the offer set forth in the International Executive Board Resolution of December 7, 1994 offering an early retirement window to all eligible full time officers and directors.

My date of retirement shall be February 15, 1995.

I understand, I will receive the following pension benefits commencing upon my retirement.

Monthly pension of $3,437.87.

Louis Scohy

Date: 12/5/94

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PLAINTIFF'S EXHIBIT
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EST AVAILABLE COPY

APPENDIX G

SEE FOLD OUT EXHIBIT

Contract of George Squier

000300

George Squier

To: International Union,
United Plant Guard Workers of America (UPGWA)

I hereby accept the offer set forth in the International Executive Board Resolution of December 7, 1994 offering an early retirement window to all eligible full time officers and directors.

My date of retirement shall be February 15, 1995.

I understand, I will receive the following pension benefits commencing upon my retirement.

Monthly pension of $2,478.82.

George Squier

George Squier

Date: 12/08/94

APPENDIX H

SEE FOLD OUT EXHIBIT

Contract of Gary Anderson

000301

Gary Anderson

To: International Union,
United Plant Guard Workers of America (UPGWA)

I hereby accept the offer set forth in the International Executive Board Resolution of December 7, 1994 offering an early retirement window to all eligible full time officers and directors.

My date of retirement shall be February 15, 1995.

I understand, I will receive the following pension benefits commencing upon my retirement.

Monthly pension of $1,682.95.

Gary Anderson

12-9-94

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PLAINTIFF'S EXHIBIT
5

APPENDIX I

Excerpts Exhibit 36

**Letter from Union Attorneys
to President McConville
Dated 1/4/95**

Could the Convention Approve the Window Early Retirment Plan Without Violating § 501?

The Convention lawfully could amend UPGWA Constitution Article XI, § 2(b), to read as follows:

> "The normal retirement age shall be sixty (60) years. Disability and early retirement benefits shall be in accordance with the normal retirement age. FROM TIME TO TIME, WINDOW EARLY RETIREMENT MAY BE OFFERED, INCLUDING IMPUTED AGE AND/OR SERVICE CREDITS, WHEN SUCH OFFERS RESULT IN REDUCTIONS OF STAFF WHICH ARE NECESSARY TO PROTECT THE UNION'S FINANCIAL POSITION." [Added text is in capital letters.]

* * *

APPENDIX J

Excerpts of *de benne esse* Deposition of David Kaufman

[p.85]

Q Thank you. And under the director's office we see-- you see the figure 1.7 million?

A Correct.

Q And because that involved elimination of three directors and only two were actually eliminated, the projected savings from the elimination of Mr. Anderson and Mr. Squier's position would be two-thirds of 1.7 million, right? Roughly?

A Roughly.

Q Thank you. And then the elimination of the vice-president's position is a projected savings of $524,000.00, right?

A Correct.

Q And if we added up those two numbers, two-thirds of 1.7 million and the $524,000.00, that would roughly be the savings to the union from the elimination of Anderson and Squier's position and Lou Scohy's position, right?

A I know there's a savings from three of 'em. I'd have to review this to see if there were other [p.86] savings besides.

Q Okay. But that number, whatever that number is, and we can come up with it at trial, includes paying the increased pension benefits as reflected by the three exhibits I gave you earlier today for the three Plaintiffs, right?

A Yes.

Q So in addition to saving money from eliminating - - well strike that.

And at the time of your deposition you believed those savings were, in fact, achievable; do you recall that?

A I can't answer whether you could eliminate a position. The savings were there if the positions were eliminated. You say achievable; that would define whether or not I think that the positions could be eliminated and you can save the money. You can save the money if you can eliminate the positions.

Q At the time of your deposition in September of '96, do you recall indicating that the union was, in fact, on track to achieve these savings?

A Yes.

Q Okay. At the time you ceased doing work for the union at the end of 1997, was the union still, to [p.87] your knowledge, on track to achieve these savings?

A Yes.

Q Now the union has had another benefit in addition to these savings because Mr. Anderson, Mr. Squier and Mr. Scohy are not there; am I correct?

A I thought my projection already figured they were not there.

Q Okay. But now that the union hasn't paid the early retirement benefits for the last five years, they've had the use of those monies in addition to these savings, right?

A At the present.

Q And just so the record's very clear, for example, the $524,000.00 showed as being saved for Lou Scohy's position already includes the payment to him, that's a net savings 'cause it includes the payment to him of all of the retirement benefits reflected by the earlier exhibit, right?

A His retirement benefits were not in here.

Q Okay. Is this savings figure a net figure after calculating the cost of his retirement benefits?

A Yes.

Q The same for the director's position, it's a net figure after the payment of the retirement [p.88] benefits?

A Correct.

Q Now, after January of - - Or after December of 1994, the union went ahead and eliminated two director's positions and Mr. Scohy's position, correct?

A I believe so.

* * *

APPENDIX K

Excerpts Testimony of Eugene McConville

[p.131]

their districts we're going to be eliminated.

THE WITNESS: That was already withdrawn, that was part of what we withdrew.

THE COURT: So in addition to withdrawing the agreements, you also withdrew the plan to eliminate Mr. Anderson's and Mr. Squier's districts?

THE WITNESS: Yes.

THE COURT: That was, ultimately, proposed after the convention, wasn't it?

THE WITNESS: We had a resolution by the board, I think on January 24th, that realigned the regions. It was a separate action.

THE WITNESS: Which - -

THE COURT: Which realignment included the consolidation of those two districts with other districts.

THE WITNESS: Effective date was at the conclusion, so there was nothing changed between then and the convention in my opinion anyway.

THE COURT: So Mr. Anderson and Mr. Squier had at that point, two weeks or so to sort of gear up and fight this at the convention.

THE WITNESS: The convention wasn't until the middle of May.

BY MR. MORRIS:

Q So the record's clear, even though this resolution [p.132] said you're going to defer both the realignment and the early retirement windows to the convention, the union did not do that.

And, instead on January 24th, just a few weeks later, you circulated another referendum to Board members asking them to go forward with the realignment and the consolidation in order to save the union the cost of mini conventions, right?

A That's correct.

Q On February 2nd, you circulated another document which is another one of our exhibits, Your Honor, which I'll just give you the exhibit number, the January 24th letter which is in evidence is Exhibit 29.

And, Mr. McConville, I'm not going to ask you a question about it right now.

And the February 2nd letter is Exhibit 33.

And in Exhibit 33 - - if you need to look at it you can, you said:

> We have now realigned to save money in consolidated regions. Here's a map with the new realignment and these realignment of regions will become effective on the first day of the convention unless the convention votes to over turn them. Right?

A As far as I can recall, yes, that's exactly what was said.

[p.133]

Q So even though you made a deal with the plaintiffs in - - on December 7 and December 8th, but the resolution to realign and give them early retirement benefits, you rescinded that on January 5th.

But then on January 24th, you went ahead with the realignment and reorganization of the regions, anyway, right? That's what you did?

A To save the International Union.

Q To save money?

A Yeah.

Q So you accepted the benefits.

In fact, what happened was, once the realignment was done, Mr. Anderson did not run you indicated, right?

A I didn't indicate that, but he did not run.

Q Mr. Scohy did not run - - back up for a minute.

Also on January 26th, you wrote to all brothers and sisters in the union and took the Team McConville platform, that Team McConville wanted the Vice President's position done away with as part of cost savings, right?

A At some point in time. I don't know if it was January 26th. I'm not sure.

Q In December of - - part of the early retirement contract, you knew that Mr. Scohy would indicate he would not oppose eliminating the Vice President's position, he would retire to leave the position vacant so the union

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APPENDIX L

CONSTITUTION AND BY LAWS

of the

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA (UPGWA)

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ARTICLE III

Constitution and By-Laws

This Constitution and By-Laws shall govern this International Union, United Plant Guard Workers of America (UPGWA) and its affiliated Local Unions, and can be amended only by a majority vote of the delegates at succeeding Conventions; provided, however, that during the interim between Conventions, this Constitution and By-Laws can be amended by a majority vote of the total International Membership voting in all Local Unions.

The International Executive Board shall be empowered by a two-thirds vote to make such interim changes in this Constitution and By-Laws applicable only until the next regular Constitutional Convention, as may from time to time be necessary to conform this Constitution and By-Laws with any applicable laws.

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